Supreme Court, U.S.
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No. _____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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**JOHN P. MESSINA,**

***Petitioner,***

**v.**

**JOHN LABATT, LIMITED, a Canadian corporation; JOHN LABATT, INC., a California corporation; LABATT FOOD COMPANY, a division of John Labatt Limited; EVERFRESH, a division of Labatt Food Company; EVERFRESH, INC., a Michigan corporation, and EVERFRESH, INC., a Canadian corporation, jointly d/b/a EVERFRESH JUICE CO.; AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation d/b/a HOME JUICE CO.; DANIEL KOTWICKI; ALBERT "ACE" ALLEN; CHARLES JAMAIL; and HENRY LANG,**

***Respondents.***

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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137 pp

## QUESTIONS PRESENTED

1. Whether this Court should exercise its supervisory power over the courts below where the court of appeals allowed the district court to depart so far from the accepted and usual course of judicial proceedings by using means that violated the First Amendment to control the litigation and the conduct of counsel, including: (a) sealing an entire court file without explanation for five years despite the fact that the complaint alleging a conspiracy to adulterate food products was based exclusively on public information; (b) accepting filings in chambers instead of through the clerk's office, and creating no docket sheet in the case, to shield the file from public view; (c) construing a seal and protective orders retroactively to bar speech addressing matters of public record and punishing such speech without providing the speaker an opportunity to demonstrate public sources; (d) publishing an order (five years after the fact) explaining that the seal was ordered to avoid embarrassing the defendants into settling, even though the speech punished occurred after the defendants had reached a settlement voluntarily; and (e) imposing a five-year prior restraint backed by the threat of forfeiting a $50,000 bond that prevents discussion of matters of public record, including the court's order, without obtaining the court's permission first.

2. Whether, in reviewing orders limiting First Amendment rights, the court of appeals must review de novo all challenged legal and factual determinations, or whether it can simply defer to the district court's fact findings and conclusions of law.

3. Whether a district court may issue a seal order and protective orders that prohibit access to all court documents and proceedings (and all information contained therein), starting with a complaint that is based exclusively on public information and encompassing even the court's orders (including the seal

order itself), because the court is concerned that the defendants may be embarrassed into settling rather than risking reputational harm from allegations that they have adulterated their product in violation of federal law.

4. Whether the district court could, after the defendants had voluntarily settled the lawsuit, construe its seal and protective orders as a gag order barring discussion of even publicly available information, especially after defendants have entered into a voluntary settlement of the lawsuit, in a manner that (a) imposes the gag retroactively by punishing speech before the court clarified that its order was a gag and (b) extends the gag five years into the future as a prior restraint punishable by forfeiture of a $50,000 bond.

5. Whether a district court may invoke Federal Rule of Civil Procedure 11 to sanction an attorney for the attorney's truthful filings at the court of appeals.

6. Whether a district court may impose a $150,000 monetary judgment against an attorney in a contempt proceeding when the judgment is not designed to coerce compliance with any court order and when there has been no evidence of any harm resulting from the alleged contempt.

## LIST OF PARTIES TO PROCEEDINGS BELOW

The parties in the court of appeals were (1) the petitioner listed in the caption (who was an attorney for plaintiff Grove Fresh Distributors, Inc. in the district court), (2) the respondents listed in the caption (defendants in the district court), and (3) an amicus curiae, the Ad Hoc Coalition of In-Depth Journalists (intervenors in the district court).

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***Respondents.***

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

John P. Messina petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit affirming (1) a contempt and sanctions judgment against him, (2) an order requiring that he seek the district court's leave before speaking about adulterated orange juice or related litigation through June 2000 on pain of forfeiting a $50,000 bond he was required to post, and (3) an order barring him from filing a class action complaint in state court because the court believed he was not fit to serve as class counsel. As

we will show, the court of appeals, in affirming the district court, used the wrong standard of review and incorrectly upheld a blanket seal order that Mr. Messina supposedly violated. The seal order was designed merely to protect the reputational interests of defendants. Finally, the court of appeals rubberstamped the district court's prior restraint on Mr. Messina and its order barring Mr. Messina from filing the state court complaint without addressing any of the constitutional impediments to those orders.

## OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a), was not designated for publication. It appears on the Westlaw database at 1998 WL 54676 (7th Cir. Feb. 5, 1998). The order denying Mr. Messina's petition for rehearing with suggestion of rehearing en banc (Pet. App. 87a), and the order staying the mandate pending the filing of this petition (Pet. App. 88a), were not published . The opinion of the district court (Pet. App.34a), is reported at 888 F. Supp. 1427 (N.D. Ill. 1995). An earlier opinion of the court of appeals involving claims of intervenors is published at 24 F.3d 893 (7th Cir. 1994). Numerous other orders of the district court (Pet. App. 9a-18a; 82a-85a), were challenged at the court of appeals; none of those orders is published.

## JURISDICTION

The judgment of the court of appeals was entered on February 5, 1998. (Pet. App. 1a.) A timely filed petition for rehearing was denied on May 7, 1998. (Pet. App. 87a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. Const. amend. I;

U.S. Const. amend. V; and

Fed. R. Civ. P. 11.

Because of their length, these provisions are set forth in the appendix. (Pet. App. 90a-92a.)

## STATEMENT

Starting in August 1989, Mr. Messina served as Chicago local counsel for plaintiff Grove Fresh, a small, privately-owned juice distributor, in five unfair competition cases alleging that certain national and regional competitors had labeled and sold adulterated juice as 100% pure juice. One of these cases, involving the Everfresh defendants, was assigned docket no. 89c1113. At the end of 1989, Grove Fresh discovered that its lead counsel -- unbeknownst to it -- had agreed with certain defendant-competitors to limit the scope of these suits, and fired that attorney. Mr. Messina became lead counsel for Grove Fresh. He then conducted extensive research of public files at the Florida Department of Citrus, the FDA, and various state regulatory agencies. This research led Mr. Messina to draft a new complaint, which alleged a conspiracy among the defendants to adulterate orange juice. After sending a summary of the claims to counsel for prospective defendants failed to produce a settlement, Mr. Messina filed this new complaint, which became 90c5009, the case below.[1/]

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1/ The district court had jurisdiction pursuant to 15 U.S.C. § 1121, 18 U.S.C. § 1964, and 28 U.S.C. § 1331, 1338(b).

Forewarned of the impending new complaint, the 89c1113 defendants filed an emergency motion in 89c1113 to have Mr. Messina file the new complaint under seal. Without explanation, the district court ordered that not only the complaint but all future pleadings be sealed. (Pet. App. 9a ("The complaint and all subsequent pleadings shall be filed under seal").)[2/] The emergency motion did not seek, and the seal order did not impose, a gag on speech by the parties or their attorneys. Mr. Messina filed a motion to lift the seal promptly. When the court denied that motion, Mr. Messina complied with the seal, even though he had gleaned all of the allegations in the new complaint from publicly available information; indeed, one defendant later sought sanctions against Grove Fresh in 89c1113 for not including all of the allegations of 90c5009 in 89c1113 (which was never sealed) precisely because the information in 90c5009 had been "available ... from public agencies without the need for a court order or the cooperation of [defendant] Everfresh" when Grove Fresh filed 89c1113 the previous year.

The seal's scope was all-inclusive. Defendants' filings were made in chambers and the entire court file was maintained there. The clerk of the district court maintained no docket sheet for the new case. None of the court's orders -- not even the seal order -- were publicly available. In fact, in May 1991, Grove Fresh had to file a motion to obtain a copy of the August 1990 seal order, which it had never received.

The district court also entered protective orders governing documents produced in discovery in 89c1113 and 90c5009. (Pet. App. 10a-18a.) The court made no "good cause" finding in doing so. Like the seal, the protective orders were applied with exceptional breadth. For instance, in 89c1113, Everfresh produced 19,000 pages of documents on June 22,

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2/ The seal order erroneously states that plaintiff had moved for the seal order.

1990, designating all but 200 "confidential." Grove Fresh objected on overbreadth grounds and to the confidential designation of "batch sheets" which, Grove Fresh asserted, revealed formulas for producing adulterated orange juice. Grove Fresh asserted that the FDA should receive copies of these batch sheets because of the important public interests involved; it informed Everfresh that it would disclose these batch sheets to the FDA, but, in accordance with the procedures of the protective order, it gave Everfresh time to seek a court order assessing its claim of confidentiality. On Everfresh's motion to resolve the dispute, the district court ordered that the batch sheets not be given to the FDA, stating without further explanation, "the claim of confidentiality here is well taken." Mr. Messina complied with this order.

On September 26, 1991, the Ad Hoc Coalition of In-Depth Journalists ("Coalition") moved to intervene in 90c5009 to vacate the seal and protective orders. Although the district court granted the Coalition's motion to intervene, a year later it denied the Coalition's motion to have the secrecy orders vacated. The Coalition appealed from this order.

While the Coalition's appeal was pending, the underlying unfair competition litigation settled. Grove Fresh relied upon co-counsel whom Mr. Messina had enlisted to conduct the negotiations that led to settlement. Because of his opposition to the settlement conditions demanded by the defendants, plaintiff relieved Mr. Messina of responsibility for representing it, four months after the negotiations started. The parties and the district court held three settlement conferences between January and March, 1993. The parties agreed to oral terms on February 19, but defendants refused to finalize the settlement until Mr. Messina signed a consulting agreement to create a conflict preventing him from suing them again on behalf of any other plaintiff. Mr. Messina acceded. Defendants executed a settlement agreement with Grove Fresh and a consulting

agreement with Mr. Messina. These agreements were not filed with the court.[3/]

Shortly after the settlement, defendants filed a response brief in the Coalition's appeal asserting that the seal was justified because Grove Fresh's 90c5009 complaint was false and was drafted and filed by Mr. Messina for the improper purpose of extracting a settlement.[4/] The Coalition had never seen the complaint or any documents or discovery from 90c5009, or the settlement agreement, and so could not reply to the assertion. Mr. Messina, who was not a party to this appeal, responded to these attacks on his complaint by rescinding the consulting agreement and demanding that the defendants retract their charges. When they refused, Mr. Messina hired counsel to negotiate a procedure for responding to the charges made in the court of appeals, but defendants would not agree to one. After these efforts failed, Mr. Messina filed a motion with the court of appeals that disclosed the settlement sum and identified individuals associated with alleged co-conspirators who had asserted the Fifth Amendment during discovery to demonstrate that the complaint was substantial.[5/] The court of appeals struck Mr. Messina's papers, but not before a New York Times reporter had called Mr. Messina for a comment on the charges in defendants' brief, located the papers in the court's files, and published the settlement sum.

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3/ An unexecuted earlier draft version of the settlement agreement had been filed with the court as an exhibit to a motion to enforce an oral settlement agreement. The district court did not rule on that motion, and the parties changed the draft before they executed it.

4/ By settling the case, defendants avoided any findings concerning whether the allegations were true or false, and no findings to that effect were ever made by any court.

5/ During discovery, several witnesses either had asserted their Fifth Amendment rights by refusing to answer deposition questions or had stated they would, if deposed.

On May 12, 1994, the court of appeals issued its opinion in the Coalition's appeal. 24 F.3d 893 (7th Cir. 1994). The court of appeals remanded the case to the district court with instructions to explain its justification for the seal. During the remand proceedings, the district court unsealed portions of the record but continued to refuse to allow disclosure of the identity of the persons who asserted the Fifth Amendment in discovery, the settlement sum, supposedly disaparaging references in the 90c5009 complaint, and defendants' proprietary information disclosed during discovery.[6/]

Defendants moved for a contempt finding and sanctions against Messina for his filings in the court of appeals; Mr. Messina responded to that motion and moved to clarify the scope of the seal. At an April 8, 1994 hearing, the district court "advise[d] Mr. Messina not to speak about the case and what might possibly transgress the seal with anybody" unless he obtained the court's prior approval of "exactly what he wants to say" by showing that it is "exactly what is in the public record." (Pet. App. 25a.) The district court issued no order implementing these comments; thus, Mr. Messina had no order from which to appeal.

Subsequently, defendants renewed their motion for contempt and sanctions, claiming that Mr. Messina: (1) violated the seal and protective orders by disclosing in his court of appeals filings the amount defendants paid Grove Fresh in settlement, the identities of persons who asserted the Fifth Amendment, and by revealing allegations of the 90c5009 complaint in a letter to the Coalition's counsel; (2) violated Federal Rule of Civil Procedure 11 by filing in the court of

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6/ On June 12, 1998, in compliance with the district court's prior restraint, Mr. Messina filed a motion with the district court for clarification concerning whether any portions of this petition disclosed information subject to the seal or protective orders. The district court has authorized public filing of the petition in this Court.

appeals papers stating he was an "attorney of record" for Grove Fresh; and (3) violated a district court order to appear at a October 21, 1993 hearing. The district court held a one-day evidentiary hearing on these issues on February 3, 1995.

On June 9, 1995, the district court published an opinion finding Mr. Messina in contempt and in violation of Rule 11. (Pet. App . 34a.) The district court's opinion, issued five years after the seal order, contained the first written justification for the secrecy orders: the court's concern that Mr. Messina wanted to "beat defendants into submission" by generating adverse publicity that would force them to settle. (Pet. App. 36a.) This concern is noteworthy given that each of the instances that the court determined violated the orders occurred after the underlying suit had already settled and that there has never been a finding that the 90c5009 complaint lacked merit. The opinion not only excoriates Mr. Messina professionally and personally, but also imposes a five-year prior restraint on him barring him from discussing the case, including the court's published opinion, without the court's prior approval, upon pain of forfeiting a $50,000 bond he had to post with the clerk through June 2000. (Pet. App. 78a.)

Subsequently, potential clients asked Mr. Messina to file a class action in state court on behalf of orange juice consumers. Mr. Messina applied to the district court for leave to file his proposed complaint in state court, and satisfied the court that the complaint did "not reveal information which has been deemed confidential." (Pet. App. 82a.) Nevertheless, the district court denied Mr. Messina leave to file the suit in state court because, in its view, Mr. Messina would not be adequate class counsel. (*Id.*)

On February 7, 1997, the district court entered judgment against Mr. Messina in the amount of $149,554.45 as damages and sanctions for the conduct cited in the June 9 opinion. This

sum represented approximately 90% of the legal fees and costs defendants claimed they had incurred in prosecuting the contempt. Defendants made no showing that they had suffered any damages from Mr. Messina's conduct apart from the money invested in prosecuting the contempt. Mr. Messina appealed.[7/]

Mr. Messina's consolidated appeals were heard by the same court of appeals panel that had heard the Coalition's appeal because the panel deemed his appeal successive. The panel declined to hear oral argument and affirmed the district court in a five-page unpublished order that cited only five cases. (Pet. App. 1a.) Between them, the parties had cited 115 cases. The court of appeals deferred to the district court on every substantive and procedural point.[8/] (Pet. App. 1a-8a.)

In addition to challenging the findings that he had violated the seal and protective orders, Mr. Messina attacked the contempt judgment on the grounds that the orders he supposedly violated were invalid. With respect to the validity of the district court's entry and application of the seal and protective orders, the court of appeals stated merely that it had "no reason to substitute [its] judgment" for the district court's. (Pet. App. 5a.) In response to Mr. Messina's position that the district court improperly applied the seal and protective orders as a gag on his speech, the court of appeals conclusorily held that "the district

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7/ Mr. Messina also had filed a timely protective notice of appeal in the wake of the June 9, 1995 opinion. He filed a third notice of appeal on June 25, 1997, as a protective measure, after several orders from years earlier in the case were finally docketed.

8/ The court of appeals did determine that it had jurisdiction to review all of the challenged orders and that Mr. Messina was not collaterally barred from asserting the invalidity of the seal and protective orders as a defense to the contempt charges. (Pet. App. 5a.) As an alternative basis for its holding, the district court had found that Mr. Messina was collaterally barred. (Pet. App. 59a-61a.)

court has broad discretion to grant the relief it deems necessary and appropriate." (*Id.*)

Likewise, in affirming the Rule 11 sanctions for filings in the court of appeals, the court of appeals stated simply that "we agree with [the district court's] disposition." (Pet. App.7a.) The court of appeals also affirmed the bonded five-year prior restraint and the money judgment without addressing any of Mr. Messina's constitutional, legal, and factual challenges. Although the court of appeals denied Mr. Messina's petition for rehearing (Pet. App. 87a), it stayed issuance of its mandate pending resolution of proceedings in this Court. (Pet. App. 88a.)

## REASONS FOR GRANTING WRIT

The practice of cordoning off judicial proceedings from public scrutiny has become increasingly pervasive. *See* John Gibeaut, *Secret Justice*, 84 A.B.A. J. 50 (Apr. 1998); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991). This case is particularly troubling because the allegations of the sealed complaint all were gleaned from the public record; because the seal encompassed the entire court file, including the court's orders; because the expressed reasons for the seal, *i.e.*, to prevent defendants from being embarrassed into settling, ceased to exist when defendants settled voluntarily, which occurred before the very first of Mr. Messina's supposedly violative acts; and because the court issued a five-year prior restraint to bar Mr. Messina from speaking about the case or the underlying facts, complete with a $50,000 bond to be forfeited if he did. The district court's handling of this case thus "departed so far from the accepted and usual course of proceedings." Sup. Ct. R. 10(a). The court of appeals affirmed the secrecy orders and rulings below by applying an extraordinarily lax standard of review. Consequently, this case presents a singularly serious example of these inappropriate practices, and a good vehicle in

which the Court can exercise its supervisory powers to establish clear limits on the use of such unconstitutional means to control litigation.

The decisions below conflict with a number of key First Amendment decisions from this Court and the sister circuits. Without hearing or explanation, the district court took the extraordinary step of sealing every filing and order in 90c5009, even though it is undisputed that Mr. Messina had public sources for every allegation in the complaint. Five years after the fact, the court justified this veil of secrecy as necessary to protect defendants from being coerced into settling to protect their reputations. Yet the court of appeals refused even to consider the validity of the asserted legal or factual bases of these orders, electing instead to defer to the district court on issues of law as well as fact. This conflicts with this Court's caselaw, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68 (1995), and with decisions of other courts of appeals, *see, e.g., United States v. Antar*, 38 F.3d 1348, 1356-57 & n.8 (3d Cir. 1994).

The seal and protective orders were legally and factually infirm. The Court requires that judicial proceedings and files can be suppressed only if suppression "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). The district court's seal served no legally-recognized higher interest and was not narrowly tailored to do so. Rather, the secrecy was implemented to protect the reputations of the defendants. Other courts of appeals hold that reputational interests and commercial self-interest do not warrant a seal order, much less a blanket seal. Moreover, by affirming the construction of these orders as a gag to prohibit the discussion of publicly available information, the decision below clashes with *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984),

with *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305-06 (1983) (Brennan, Circuit Justice), and with the due process requirement that parties have notice of what speech is prohibited. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108 n.3 (1972). Finally, the decision below requiring Mr. Messina to seek the district court's permission before speaking about orange juice litigation amounts to a flagrant disregard for the Court's long line of cases striking down prior restraints as unconstitutional. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

The district court only compounded its errors in veiling the case from the public when it attempted to stretch Rule 11 and its contempt power beyond their range to punish Mr. Messina for exercising his speech rights. The district court sanctioned Mr. Messina under Rule 11 for his filings in the court of appeals. There is no precedent for this sanction, and it is contrary to the text of the Federal Rules of Civil Procedure. Likewise, the district court improperly deployed its contempt powers even though the contempt judgment was designed neither to coerce compliance with any court order nor to compensate any party for damages caused by the allegedly contemptuous conduct. Without addressing any of these deep flaws in the district court's ruling, the court of appeals affirmed.

The district court's secrecy orders, and their approval at the court of appeals, transcend the discrete First Amendment, due process, and procedural questions presented in this petition and constitute a situation where the proceedings departed so far from the normal course of judicial proceedings as to call for the exercise of the Court's supervisory power. *See* Sup. Ct. R. 10(a).

## I. The District Court Proceedings, Affirmed By The Court Of Appeals, Are So Far Removed From The Accepted And Usual Course Of Judicial Proceedings As To Call For The Exercise Of This Court's Supervisory Powers.

Supreme Court Rule 10(a) provides that this Court may consider granting a writ of certiorari where the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Although this supervisory power is exercised only rarely, the events at the district court require this Court to issue a clear signal that the district court's handling of the case was unacceptable by any measure. While this case is rare in the extent of its departure from the accepted and usual course of judicial proceedings, the frequency with which courts now close civil proceedings or parts thereof calls for this Court's comment and guidance. *See* John Gibeaut, *Secret Justice*, 84 A.B.A. J. 50 (Apr. 1998); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427 (1991). The district court had the express authority to strike scandalous pleadings under Federal Rule of Civil Procedure 12(f) and to impose sanctions for the filing of false or baseless claims under Federal Rule of Civil Procedure 11. Nevertheless, the district court charted an unconstitutional course in attempting to control the litigation. The district court simply decided to eliminate public access to this case.

In this case of unquestionable public interest alleging the adulteration and mislabelling of orange juice, the court *sua sponte* sealed the entire court file; it gave no reason for doing so until five years later; filings were made in chambers and no docket sheet was made for the case; the court gave oral "advice"

and "suggestions" concerning the seal but never clarified its scope in writing until it retroactively applied the seal as a gag, preventing discussion even of publicly available information. The district court published a lengthy opinion excoriating Mr. Messina but then barring him by the expedient of a prior restraint from responding to its attacks on his character. The district court required Mr. Messina to post a $50,000 bond to be forfeited if he spoke about orange juice litigation without first getting the district court's permission. The district court has barred Mr. Messina from filing a state court complaint on behalf of his clients, not on the ground that the complaint disclosed confidential information, but instead because the district court decided that Mr. Messina would not be adequate class counsel in the state court proceeding. The district court imposed a $149,544 judgment against Mr. Messina although there has been no evidence that defendants suffered any harm as a result of Mr. Messina's conduct, which occurred after the defendants had settled voluntarily. The district court sanctioned Mr. Messina under Rule 11 for filings at the court of appeals.

The court of appeals turned a blind eye to the manner in which the district court sought to control this litigation. While every defendant would like to have the allegations of its wrongdoing withheld from public view and adjudicated in private, the First Amendment, this Court's precedent, and sound policy prohibit such secrecy. Consequently, this Court should exercise its supervisory power to address the impropriety of closing litigation of public interest to the public. In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), this Court recognized the evils attendant upon closing just the voir dire portion of a criminal case to the public. This case provides the Court with the opportunity to address the same issues in the context of closing an entire civil case.

## II. The Decision Below To Employ Deferential Review Of First Amendment Issues Conflicts With Binding Precedent From This Court As Well As With Decisions In Other Circuits And Will Diminish First Amendment Rights.

The court of appeals deferred so broadly to the district court on every issue presented that it effectively abdicated its role of providing appellate review on key First Amendment issues. Issues receiving virtually no review or analysis included whether the seal and protective orders were erroneously entered; whether the district court erroneously construed its orders to prohibit the discussion of publicly available material; and whether the district court erred in issuing a five-year prior restraint. The court of appeals looked to whether it had any "reason to substitute [its] judgment for that of the district court" and held that it was "certainly in no position to question [the district court's] first hand impressions of Mr. Messina's conduct and the court's motivation for entering the protective order and seal." (Pet. App. 5a.)

In certain First Amendment contexts, the Court has already recognized that a reviewing court must conduct plenary review of all legal and factual determinations restricting speech rights. For example, in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567 (1995), the Court held that "our review of petitioners' claim that their activity is…protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."

In keeping with this Court's rulings, other courts of appeals require de novo review of district court orders that limit First Amendment rights, not only of legal issues but of factual issues as well. The United States Court of Appeals for the Third

Circuit, for example, held that in reviewing the propriety of a seal order, it would "exercise plenary review in determining whether the district court applied the proper legal principles" *and* "engage in an independent factual review of the full record." *United States v. Antar*, 38 F.3d 1348, 1356-57 & n.8 (3d Cir. 1994). The Tenth Circuit also applies this heightened standard of appellate scrutiny in First Amendment cases. *Lytle v. City of Haysville*, 138 F.3d 857, 862 (10th Cir. 1997) (reviewing de novo rejection of claim under *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), on grounds that "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression").

In this case, much of the sealed material below was undoubtedly subject to the First Amendment -- rather than merely the common law -- right of access since it included court orders and materials upon which the court relied in issuing those orders. *See Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (First Amendment right of access applies to summary judgment motion in civil case). Thus, the deferential standard of review employed by some courts when considering the common law right of access, *EEOC v. National Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995), is inappropriate.

Moreover, the court of appeals applied its extremely deferential standard in reviewing the bonded five-year prior restraint that the district court imposed. Unquestionably, this prior restraint precludes the exercise of core First Amendment rights and is deserving of much closer appellate review.

The complete deference that the court of appeals gave to the district court is especially troubling not only because the

court of appeals ignored the First Amendment proscriptions discarded at the district court but also because it overlooked the fact that the district court's recollections were as much as five years old in 1995, and were severely hampered by the lack of an organized record, or even a docket sheet. This is borne out by the fact that *neither* of the only two instances the district court cited to support its findings on the need for the seal and protective orders actually lent any support. (Pet. App. 51a n.11.) One of the instances involved Mr. Messina allowing Everfresh the opportunity to seek the district court's assessment of Everfresh's assertion of confidentiality as to certain documents produced in discovery. Mr. Messina *complied* with the district court's determination that the documents were properly deemed confidential, and did not disclose those documents to the FDA. The second instance occurred several months *after* the seal had been entered and involved defendants' emergency, ex parte motion before a different judge claiming, without any support, that Mr. Messina intended to publish confidential information. Again, Mr. Messina complied with the non-disclosure order. Indeed, the record reveals absolutely no pre-seal disclosures of allegedly confidential information by Mr. Messina.

The deference given by the court of appeals to the district court's *sua sponte* decision to seal the entire court file is contrary to Supreme Court precedent, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567 (1995), and the rule in other circuits, *see United States v. Antar*, 38 F.3d 1348, 1356-57 & n.8 (3d Cir. 1994). More importantly, the decision to adopt a deferential standard of review can only have a deleterious impact on First Amendment interests. The district court's blanket seal order, retroactive gag order, and bonded five-year prior restraint called for a closer look on appeal. De novo review of district court decisions impinging on free speech rights would provide an important measure of protection against

district courts tempted to close off civil cases from public access.

## III. The Decision Below To Uphold The District Court's Seal And Protective Orders Contravenes Precedent Of This Court And Other Circuits And Is Repugnant To The First Amendment And Common Law Right Of Access To Judicial Proceedings.

The First Amendment and the common law create a strong presumption that judicial proceedings and files should be open. This presumption is rebuttable only upon demonstration that suppression "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984). In direct conflict with *Press-Enterprise*, the court of appeals upheld the district court's seal despite the fact that it served no legally-recognized higher interest and was not narrowly tailored to do so.

### A. The Decision Below Conflicts With Existing Precedent Defining "Higher Values."

Neither the court of appeals nor the district court addressed the "higher values" that the seal was essential to preserve. There were none. The district court stated that "the possibility of commercial disparagement and injury to reputation were originally behind imposing the seal." The court of appeals cited no authority on this point, but in upholding the seal thus decided in conflict with the cases of other courts of appeals that uniformly hold that risk of reputational injury is *not* legally sufficient to seal a case. *E.g.*, *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) ("potential embarrassment and injury to reputation" not sufficient to bar public access); *see also Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996)

("commercial self-interest" does not justify secrecy); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 n.18 (1st Cir. 1989) ("[r]ecords cannot be sealed on the basis of general reputation and privacy interests"); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570-71 (11th Cir. 1985) (a showing that information would harm a company's reputation is insufficient to justify a seal). Because most defendants in civil actions are accused of wrongdoing, and thus, are subject to reputational injury, the justification for the seal below would permit almost all cases to be sealed.

Although the other courts of appeals appear to be in agreement that the risk of reputational injury does not justify a seal, the decision of the court below to depart from this line of authority demonstrates the need for this Court to address this vital issue. The Court should clarify whether reputational interests justify a seal, and if so what the permissible scope of such a seal would be. The decision of the court of appeals to affirm -- without oral argument in an unpublished opinion -- the unparalleled secrecy of the proceedings at the district court has dark implications for the principle that judicial proceedings should remain open to the public. While litigants often would prefer that such proceedings remain private, the public interest in the functioning of the courts, which the public funds, calls for openness. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1980).

No precedent allows a district court to seal an entire case because of concerns that if word got out about the existence of the case defendants might settle. Presumably, this Court's pronouncement in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978), that a seal may be appropriate to forbid access to "business information that might harm a litigant's competitive standing" refers only to proprietary or trade secret information, and not to information of public interest, like allegations of mislabelling or adulteration of food products in

violation of federal law. Indeed, because defendants settled this case, no court has ever concluded whether plaintiff's allegations were true or false, making their suppression even more improper. *See Ibanez v. Florida Dept. of Bus. & Prof.*, 512 U.S. 136, 142 (1994).

Even as to the supposedly proprietary documents, the summary affirmance of the district court's protective orders was erroneous. The protective orders entered in 89c1113 and 90c5009, which the district court used to protect these documents from disclosure, also were invalid. The district court entered these orders (Pet. App. 10a-18a), without any Federal Rule of Civil Procedure 26(c) finding of "good cause." In other circuits, this would be fatal. *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483-84 (3d Cir. 1995). This Court should resolve this conflict and clarify the parameters of Rule 26's "good cause" requirement. Further, the protective orders were not appropriately tailored: Mr. Messina requested language excluding from protection documents evidencing adulteration. Without explanation, the district court adopted defendants' proposed protective order, which contained no such exclusion.

The court of appeals also failed to acknowledge that the single pre-seal instance the district court cited in support of its belief that Mr. Messina sought to harm the defendants -- Grove Fresh's desire to report the defendants' activities to the FDA -- falls squarely within the First Amendment right of businesses to petition the government to take adverse action against competitors. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965).

The interests served by the openness of judicial proceedings are wide-ranging. Most obviously, the media and

the public have a keen First Amendment interest in open proceedings. Openness also helps insure that "procedural rights are respected, and that justice is afforded equally." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 593-97 (1980) (Brennan, J., concurring). In addition, the secrecy decreed by the district court in this case, alleging that defendants mislabelled and adulterated orange juice, ignored the rights of consumers to hear speech "as to who is producing and selling what product, ... and at what price." *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 765 (1976).

### B. The Decision Below Conflicts With Existing Precedent Defining "Narrowly Tailored."

The courts below likewise failed to consider whether the seal was "narrowly tailored," as required by *Press-Enterprise*. It was not. Asked by defendants to seal just a complaint, the court *sua sponte* sealed the *entire* court file so that all subsequent filings would be sealed. Defendants filed their papers directly in chambers, no docket sheet was created for almost five years, and after the settlement the district court granted defendants permission to remove almost the complete court file permanently because, in the court's words, defendants "bought the case from plaintiffs" through settlement.[2/] The decision of the court of appeals conflicts not only with this Court's precedent but also authority from other circuits rejecting such wholesale seal orders. *See Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (requiring that any order restricting access to papers filed in connection with a motion for summary judgment must be narrowly tailored to serve a compelling governmental interest); *Publicker Indus., Inc.*

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2/ The defendants were not able to take the court file, however, because of the pendency of the Coalition's appeal in the court of appeals.

*v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) (reversing closure order where no alternatives to closure had been considered); *Associated Press v. United States Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (requiring showing that less drastic alternatives will not adequately protect the interests at issue).

Nor were the protective orders narrowly tailored. Mr. Messina specifically objected to the fact that the protective orders did not exempt from their scope evidence of formulas for adulterating juice, which he contended were not appropriately subject to court protection. Nevertheless, the district court held that such documents produced in discovery were subject to the orders. The district court also held that the protective orders covered the identity of persons asserting the Fifth Amendment during discovery, despite the fact that the identity of these persons were not "documents" produced in discovery, nor is taking the Fifth "confidential and proprietary" information facilitating discovery. (Pet. App. 10a-20a.) This Court should clarify whether the *Nixon* case, or any other case or principles, permits use of such a broad protective order under these circumstances.

## IV. The Appellate Court's Approval Of The Application Of The Seal And Protective Orders To Prohibit Discussion Of Publicly Available Information Upsets First Amendment And Due Process Principles And Opens The Way For Additional Erosion Of Free Speech Rights.

### A. The Decision Below Prohibits Speech Concerning Matters Of Public Record In Conflict With *Seattle Times*.

Nothing in the seal and protective orders did, or properly could, bar speech about information obtained from public sources. A party "may disseminate the identical information

covered by the protective order as long as the information is gained through means independent of the court's processes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). The information in the 90c5009 complaint fell squarely within this rule because, as defendant Everfresh admitted in its 1992 sanctions motion, "discovery from Everfresh was not necessary to obtain the information [Mr. Messina] eventually used to support [90c5009's] RICO allegations. The information was available ... from public agencies without the need for a court or the cooperation of Everfresh."

### B. The Decision Below Constitutes An Unconstitutional Retroactive Gag Order Lacking Sufficient Specificity To Be Punishable By Contempt In Conflict With *International Longshoremen's Ass'n.*

Gag orders are extraordinary, justified only by a serious and imminent threat to the administration of justice. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305-06 (1983) (Brennan, Circuit Justice). The court never found such a threat, and none existed. All of the statements for which Mr. Messina was punished occurred after Grove Fresh and defendants had settled, and were triggered by defendants' own statements at the court of appeals that Messina had drafted a false complaint to extort a settlement. These statements effectively charged Mr. Messina with professional misconduct and arguably criminal conduct.

Nevertheless, on April 8, 1994, the district court orally "advise[d] Mr. Messina not to speak about the case" without first showing the court "exactly what is in the public record and indicat[ing] that this is exactly what he wants to say." (Pet. App. 25a.) No written order implemented this procedure. The district court later stated that it had not issued a gag, but it effectively

transformed the seal and protective orders into a gag retroactively in its June 1995 opinion, by holding Mr. Messina estopped from proving public sources for his information because "he never once attempted to follow required procedure or even consult me in a more informal manner." (Pet. App. 53a.) This deprived Mr. Messina retroactively and prospectively of his First Amendment right to disseminate information "gained through means independent of the court's processes." *Seattle Times*, 467 U.S. at 34. The court of appeals ignored this entire argument.

Under this Court's precedent, contempt requires orders framed "so that those who must obey them will know what the court intends to require and what it means to forbid." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). Accordingly, to sustain a contempt citation, most circuits require that courts be able to point to a decree from the court which sets forth a "definite" and "specific" command which the party in contempt violated. *Glover v. Johnson*, 138 F.3d 229, 244 (6th Cir. 1998); *Gates v. Shinn*, 98 F.3d 463, 467-68 (9th Cir. 1996); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 376 (10th Cir. 1996); *Fonar Corp. v. Deccaid Servs., Inc.*, 983 F.2d 427, 429-30 (2d Cir. 1993). Taking a conflicting approach, the court of appeals below affirmed the contempt even though the district court's oral statements in April 1994 do not "definitely" and "specifically" command Mr. Messina not to speak about this case without the court's prior approval. (Pet. App. 25a ("I would advise Mr. Messina not to speak about the case"; "basically it would be best if he spoke to no one"; "I think he does have to tell me what it is he wishes to say").) The prior approval procedure was not even formalized in a written order, and was, therefore, not appealable.

### C. The Decision Below Violates Due Process By Failing To Provide Notice Of What Speech Is Prohibited.

Mr. Messina was never notified that he might be estopped to prove his public sources -- not when the district court entered the seal order issued in 1990; not when the district court entered the protective orders; not at the hearing in April 1994; not at any time before the contempt hearing. Stripping Mr. Messina of his defense that his statements were protected by the First Amendment deprived Mr. Messina of his due process right to know what speech is prohibited. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 108 n.3 (1972). Nevertheless, the court of appeals affirmed the district court's judgment without any discussion of the court's retroactive treatment of the seal and protective orders as a gag order.

### D. The Decision Below Constitutes A Prior Restraint On Speech; It Prohibits Mr. Messina Even From Discussing The District Court's Published Decision Unless He First Receives The District Court's Permission.

The court of appeals approved the five-year prior restraint and accompanying requirement to post a $50,000 bond without citing a single case; it also affirmed the order barring Mr. Messina from filing a state court class action suit for his clients without even mentioning it. The court of appeals thus overlooked the teaching of this Court that only the "highest form of state interest" can justify such an extraordinary prior restraint. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (voiding injunction against distributing leaflets in

residential neighborhood issued to protect residents' privacy); *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713 (1971) (per curiam). Of course, there is nothing even approaching such an interest in this case: as noted above, risk of reputational injury is insufficient, and the concern of a coerced settlement -- which rests only on the same reputational risk in any event -- was no longer viable given the settlement of the underlying dispute.

The district court published an opinion containing devastating professional and personal criticisms of Mr. Messina; it also barred Mr. Messina from discussing or explaining this opinion or the case in general by imposing a sweeping five-year prior restraint upon Mr. Messina enforceable through forfeiture of a $50,000 bond. As shocking an intrusion as this is upon the First Amendment, the district court already has used it more broadly. When Mr. Messina applied for permission to file a class action complaint in state court, as required by the district court's oral remarks transformed into a gag in its June 9, 1995 opinion, the district court acknowledged that the proposed complaint did not contain confidential information, but nevertheless *sua sponte* ordered Mr. Messina not to file the state court complaint because the district court disapproved of him serving as class counsel. The district court thus used the prior restraint improperly to usurp the state court's function of managing the cases and counsel before it.

## V. The Error Below In Affirming The District Court's Rule 11 Sanctions For Filings In The Court Of Appeals Invites Confusion Over District Court Power To Punish Perceived Misconduct.

The court of appeals refused to consider Mr. Messina's contention that the Rule 11 sanctions against him be reversed on the grounds that a district court has no power to sanction a party for the party's statements at another court. The court of appeals

cited no precedent in support of such an application of Rule 11, and Mr. Messina is aware of none. The text of the Federal Rules of Civil Procedure does not support such an application: the Rules "govern the procedure in the United States district courts," Fed. R. Civ. P. 1, not in the courts of appeals. The Court should grant the writ in this case to clarify whether district courts can impose Rule 11 sanctions for statements parties make in other courts.

## VI. The Decision Below Contravenes *United Mine Workers* By Affirming A Civil Contempt Judgment Designed Neither To Coerce Compliance Nor Compensate Any Injury.

The district court entered a $149,544.45 judgment against Mr. Messina even though defendants offered no evidence that they suffered any injury resulting from Mr. Messina's disclosures. The court of appeals affirmed. Thus, the decision affirming the money judgment, which itself is excessive, conflicts with *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947) (contempt fine "must of course be based upon evidence of complainant's actual loss"). The Court should grant a writ in order to establish whether the money judgment against Mr. Messina in this case can be harmonized with the Court's other pronouncements governing compensatory contempt.

## CONCLUSION

The petition for writ of certiorari should be granted and the case should be set for briefing and argument.

Respectfully Submitted,

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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**JOHN P. MESSINA,**

*Petitioner,*

v.

**JOHN LABATT, LIMITED, a Canadian corporation; JOHN LABATT, INC., a California corporation; LABATT FOOD COMPANY, a division of John Labatt Limited; EVERFRESH, a division of Labatt Food Company; EVERFRESH, INC., a Michigan corporation, and EVERFRESH, INC., a Canadian corporation, jointly d/b/a EVERFRESH JUICE CO.; AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation d/b/a HOME JUICE CO.; DANIEL KOTWICKI; ALBERT "ACE" ALLEN; CHARLES JAMAIL; and HENRY LANG,**

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# APPENDIX

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Submitted November 19, 1997*/
Decided February 5, 1998

*Before*
Hon. WILLIAM J. BAUER, *Circuit Judge.*
Hon. JOHN L. COFFEY, *Circuit Judge.*
Hon. KENNETH F. RIPPLE, *Circuit Judge.*

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, *Plaintiff-Appellee,* | ) | |
| Nos. 95-2603; 97-1471; 97-2867 | ) | Appeal from |
| v. | ) | the United States |
| JOHN LABATT LIMITED, a Canadian corporation; JOHN LABATT, INC., a California corporation; LABATT FOOD COMPANY, a division of John Labatt Limited; EVERFRESH, a division of Labatt Food Company; EVERFRESH, INC., a Michigan corporation, and EVERFRESH, INC., a Canadian corporation, jointly d/b/a EVERFRESH JUICE CO.; AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation d/b/a HOME JUICE CO.; DANIEL KOTWICKI; ALBERT "ACE" ALLEN; CHARLES JAMAIL; and HENRY LANG, *Defendant-Appellees.* | ) | District Court for the Northern District of Illinois, Eastern Division. |
| | ) | No. 90 C 5009 |
| | ) | James B. Zagel, *Judge* |

Appeal of JOHN P. MESSINA

*/ This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examination of the briefs and the record, we have concluded that oral argument is unnecessary. Accordingly, the appeal is submitted on the briefs and the record. *See* Fed. R. App. Pro. 34(a); Cir. R. 34(f).

**ORDER**

Because this case is a successive appeal, we shall assume a familiarity with the facts set forth in our previous opinion, *see Grove Fresh Distributors, Inc. v. Everfresh Juice Company, et al.*, 24 F.3d 893 (7th Cir. 1994), and limit the discussion of facts to those necessary to the resolution of this appeal. John Messina represented Grove Fresh for a substantial period of time during the underlying unfair competition litigation. Grove Fresh filed two related complaints, the first in 1989 and the second in 1990. The 1989 case alleging unfair competition was insulated by a protective order, and the 1990 case alleging a conspiracy to sell adulterated juice and to violate RICO by selling mislabeled products was under a seal and protective order. In response to Mr. Messina's conduct during the course of the litigation, American Citrus Products Corp. and John Labatt Ltd., defendants, jointly petitioned the district court alleging that Mr. Messina violated the protective order and seal and requested a finding of contempt and imposition of sanctions against Mr. Messina. The district court found Mr. Messina in contempt of court for four separate acts of both civil and criminal contempt and in violation of Rule 11 and imposed sanctions. Subsequently, the district court vacated the portion of its judgment which imposed criminal sanctions. Messina now appeals the charges of civil contempt, the Rule 11 sanctions, and the other sanctions imposed.

Before addressing the pending appeal, a brief discussion of the first appeal follows. Two separate groups appealed to this Court. One group of consumers who had brought a separate, but related claim against the defendants requested that the protective order be modified so that duplicative discovery would be avoided in its related suit. The other group, the Ad Hoc Coalition of In-Depth Journalists ("Coalition"), was moving to intervene in the 1990 case and requested this Court to vacate the seal and protective orders on the basis that it had the right to have access to the sealed information. We modified the order so that the consumers would have access to particular material to avoid duplicative discovery in the collateral litigation. Additionally, we held that the district court should not have postponed the media's access to the case file once the media had demonstrated that its access had been unjustifiably limited by the protective order.

We remanded the case to the district court and asked that the court provide an explanation for its conclusions and reasoning for ordering limited access to the case, *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994).

The district court had previously entered summary judgment against Grove Fresh in the 1989 unfair competition complaint while settlement negotiations in the 1990 case proceeded contemporaneously with the first appeal. On January 21, 1993, Grove Fresh relieved Mr. Messina of all responsibilities for its cases but did not withdraw the record of appearance for Messina until April 12, 1995. In February of 1993, the parties orally agreed to terms of a settlement but the defendants would not conclusively agree to settle until Mr. Messina also agreed to the settlement and confidentiality provisions of a consulting agreement which were not filed with the court. Thereafter, upon agreed motions to dismiss, the district court dismissed the 1990 case on April 29, 1993. However, there were subsequent problems with the settlement agreement and dismissal of the case. On August 24, 1993, the Everfresh defendants filed a motion to enforce the settlement or for relief from judgment pursuant to Rule 60(b) as a result of Mr. Messina's conduct after the dismissal. When the parties appeared before Judge Zagel, Mr. Messina was not present and the district court ordered him to appear at the next court proceeding. The parties appeared before Judge Zagel at a later date, and Messina again was not present. As a result, the district court ordered the issuance of a rule to show cause.

On October 22, 1993, Mr. Messina filed a motion in this Court in which he sought a hearing on perceived allegations of misconduct. This motion revealed the confidential amount of the settlement and confidential information gained through discovery. In this motion, Messina also stated that he was the attorney for Grove Fresh which of course was inappropriate because he had been relieved of his duties in January of 1993. We ordered Messina's motion stricken and also ordered that he show cause as to why he should not be sanctioned for filling [sic] a frivolous motion. We then referred this matter to the Illinois Attorney Registration and Disciplinary Commission for further proceedings.

Thereafter, the defendants jointly petitioned the court for a finding of contempt and other sanctions against Mr. Messina for his actions throughout the litigation. On February 3, 1995, the district court held a hearing to afford Mr. Messina an opportunity to respond to the following charges: (1) that Mr. Messina is in contempt of court for repeatedly violating the protective order and seal of the case by his disclosures of confidential discovery materials in a brief filed in the Seventh Circuit, in a letter to counsel for intervenors, and in a conversation with a reporter for the New York Times; (2) that Mr. Messina is in contempt of court for failing to appear before Judge Zagel when ordered to do so; and (3) that Mr. Messina is subject to Rule 11 sanctions for allegedly making false or misleading representations to this Court regarding his status as Grove Fresh's attorney.

The district court found Mr. Messina in contempt of court in four separate instances. For these four acts of civil contempt, he was ordered to compensate the parties for losses incurred, including attorney's fees and costs. For these four acts of criminal contempt, the district court ordered Mr. Messina to pay $1000 to the United States for each of the four instances. Additionally, in light of Mr. Messina's past disregard for court orders, the district court was concerned with future noncompliance and ordered him to post a $50,000 bond for the next five years, emphasizing that any future disclosure without consulting the court first would result in forfeiture of the money. Mr. Messina now appeals the findings of civil contempt, the Rule 11 violation, and the sanctions imposed.[1/]

As threshold matter, we requested briefing on whether we have jurisdiction to review the seal and protective orders. Mr. Messina asserts that the district court's finding of contempt is not proper because he argues that the seal and protective orders are not valid. Judge Zagel entered a protective order and sealed the case before him so as to prevent disclosure of any confidential material and adverse

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[1/] As previously noted, the district court vacated the criminal contempt, and consequently, we will not address the issue of criminal contempt.

publicity. Judge Zagel observed Mr. Messina's behavior firsthand and warned him about his inappropriate conduct and attempts to circumvent the protective orders. In his Memorandum Opinion and Order, Judge Zagel thoroughly addressed Mr. Messina's attack against the orders of confidentiality. Judge Zagel discussed the proper scope, constitutionality, and validity of the orders.

On appeal, Messina suggests that the district court erred in its interpretation of the orders and argues that they lack legal and factual bases. However, we find nothing inappropriate with the court's judgment. As we previously stated, Judge Zagel's initial failure to articulate his reasoning for ordering the seal and protective order does not automatically translate into a reversal. *Grove Fresh,* 24 F. 3d at 898-99. On remand, we requested that the district court set forth its reasoning, and Judge Zagel has provided ample explanation for his initial decision to enter a protective order and to seal the case. We find absolutely no reason to substitute our judgment for that of the district court, and we are certainly in no position to question Judge Zagel's first hand impressions of Mr. Messina's conduct and the court's motivation for entering the protective order and seal. The district court has sufficiently explained its reasons for entering the seal and protective order. Review of the seal and protective orders is properly within our jurisdiction. As such, we too conclude that the seal and protective orders were valid and constitutional and that Mr. Messina's attempts to attack the validity and constitutionality of the orders must fail.

We now turn to Mr. Messina's four acts of civil contempt and his Rule 11 violation. Mr. Messina argues that the district court improperly applied the seal and protective orders as a gag which violated due process and his First Amendment rights. The district court has broad discretion to grant the relief it deems necessary and appropriate. *McComb v. Jacksonville Paper Co,* 336 U.S. 187,193 (1949). A determination of contempt requires an order of "reasonable specificity which has been violated." *Matter of Betts,* 927 F.2d 983, 986 (7th Cir. 1991). There are three alleged violations of the orders of confidentiality: (1) disclosures in a brief submitted to this Court; (2) disclosures in a letter to counsel for the Coalition; and (3) disclosures in a conversation with a news reporter. The district court held that

these three separate instances each violated the protective orders. It is clear from the record Mr. Messina's repeated actions of disclosure were attempts to leak information to the public. We also conclude that these disclosures violated the orders of confidentiality. Accordingly, we affirm the district court's judgment finding Messina in contempt of court for these violations.

The fourth instance of contempt of court stems from Mr. Messina's failure to appear in court as ordered by Judge Zagel. Mr. Messina argues that he did not disobey any court order requiring his appearance because there was no written order issued which required him to appear. The fact that the district court did not issue a written order is inconsequential. Although the district court may not have issued a written order requiring Messina to appear, the district court clearly explained that Mr. Messina was to be present at the next court proceeding. In fact, Mr. Messina admitted that he had received notice and had knowledge that Judge Zagel had ordered him to appear. Judge Zagel concluded:

> After watching him testify, and after reviewing the record, I am convinced beyond any doubt that Mr. Messina had proper notice, fully understood his appearance was required, and knew the reasonable consequences of his actions. I find not only that Mr. Messina's choice not to appear was willful but that it was made in bad faith.

*Grove Fresh Distributors, Inc. v John Labatt Ltd.*, No. 90 C 5009 at 49-50 (N.D. Ill. June 13, 1995). Judge Zagel's findings of fact are entitled to great deference, and we find no reason to disrupt his conclusion. Accordingly, we affirm the district court's finding of contempt for Mr. Messina's failure to appear as ordered by the district court.

The fifth charge against Mr. Messina stems from the motion he filed with this Court on October 22, 1993 and the misrepresentation of his status as Grove Fresh's attorney. On November 9, 1993, we denied Messina's motion and asked that he show cause, pursuant to Federal Rule of Appellate Procedure 46(c), as to why he should not be

sanctioned for filing a frivolous motion. American Citrus then filed a motion in our Court requesting disciplinary action against Messina for his misrepresentations. In an order dated December 14, 1993, we denied American Citrus's motion, holding that "[t]he relief requested is appropriately sought in the district court." The district court then addressed this issue of a Rule 11 violation, among other things, in its judgment. Judge Zagel made three specific findings of fact each of which are independently sanctionable as violations of Rule 11: (1) Messina's claim of attorney status was not well grounded in fact; (2) Messina certified the matter was filed with a proper purpose when it was not; and (3) the filing of his brief was not warranted by existing law. We agree with Judge Zagel's disposition of this matter and the sanctions imposed for Mr. Messina's violation of Rule 11.

The final sanction against Mr. Messina involves the district court's judgment that he post a $50,000 bond for the next five years to prevent any future disclosures. The district court possesses substantial discretion to enter an order that is appropriate under the circumstances, and the violation of a prior order justifies a broader remedial order. *Madsen v. Women's Health Center,* 512 U.S. 753, 770 (1994); *Scandia Down v. Euroquilt Inc.,* 772 F.2d 1423, 1432 (7th Cir. 1985). Judge Zagel ordered Messina to consult with him first and to provide an independent source for the information before he proceeded to publicly disclose any information pertaining to the suit. If Messina fails to consult Judge Zagel, then forfeiture of the bond is automatic. In reviewing the record and Judge Zagel's findings of fact, we find that there is nothing inappropriate in the district court ordering Messina to post bond. It is clear from the record that Mr. Messina has not hesitated to disregard the district court in the past, and this bond may provide greater incentive for Mr. Messina to adhere to the district court's requests in the future.

Next, Mr. Messina argues that the sanctions imposed are improper. After finding Mr, Messina was in contempt of court and had violated Rule 11, the district court held an evidentiary hearing to determine defendants' losses, attorneys' fees, and costs. The district court awarded the defendants $149,554.45 for attorneys' fees and costs expended in prosecuting the contempt charges. There is no indication that the district court abused its discretion in awarding attorneys' fees

and costs and no reason to conclude that the monetary award was excessive. Accordingly, we affirm the district court's award of $149,554.45.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | No. 90 C 5009 |
| Plaintiff, | ) | Judge Zagel |
| v. | ) | Filed Under Seal Pursuant to Court Order |
| JOHN LABATT LIMITED, a Canadian corporation; et al., | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED AUGUST 28, 1990

Plaintiff's motion to file case under seal is granted. The complaint and all subsequent pleadings shall be filed under seal until further order of court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiff, | ) | No. 89 C 1113 |
| v. | ) | Judge Zagel |
| EVERFRESH JUICE COMPANY and HUGO POWELL, | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED MAY 25, 1990

Defendant's motion for a protective order is granted with the agreed redaction of paragraph number 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiffs, | ) | No. 89 C 1113 |
| v. | ) | Honorable James B. Zagel |
| EVERFRESH JUICE COMPANY and HUGO POWELL, | ) | |
| Defendants. | ) | |

PROTECTIVE ORDER

This matter coming to be heard on defendants' motion for a protective order, in order to provide protection of confidential and proprietary information and to facilitate discovery sought in this action.

IT IS HEREBY ORDERED:

1. A party (hereafter referred to as a "Designating Party") may designate documents it considers to be of a confidential, proprietary or trade secret nature. Such designation can be made by applying a written statement such as "Confidential" or "Subject to Protective Order" on such documents. Such designation can also be made by the Designating Party informing other counsel in writing that certain documents or categories thereof are confidential. If the Designating Party has so informed other counsel of the confidential nature of documents, then the lack of a notation on documents shall not be considered a waiver of the right to seek protection of otherwise confidential information; however, the burden of avoiding confusion or mistake as to what is, or is not, confidential shall always remain with the Designating Party.

2. Documents designated as confidential shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process. If confidential documents are to be disclosed pursuant to law or court process, the Designating Party shall be given at least 10 days advance notice, before any party makes the disclosure, to afford the Designating Party an opportunity to object to such disclosure or to seek further appropriate relief.

3. If a party objects to the designation of any document as confidential, that party shall advise the Designating Party promptly, in writing, of the objections and the reasons therefor. In that event, all items so designated shall be treated as confidential material pending resolution of the dispute. If the parties involved fail to resolve the dispute among themselves, it shall be the obligation of the Designating Party to move promptly (i.e., within 10 days of the parties' failure to resolve the dispute among themselves) for a ruling from the Court concerning the confidentiality of the items in dispute. Nothing contained in this paragraph shall alter the burden of proof respecting the confidentiality of any materials.

4. All confidential documents and materials containing confidential information shall be returned to the Designating Party at the conclusion of this lawsuit.

DATE: May 25, 1990

ENTER:

/s/ James B. Zagel

JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiff, | ) | No. 89 C 1113 |
| v. | ) | Judge Zagel |
| EVERFRESH JUICE COMPANY and HUGO POWELL, | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED JUNE 12, 1990

Enter protective order (nunc pro tunc 25 May 90).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiff, | ) | No. 89 C 1113 |
| v. | ) | Judge Zagel |
| EVERFRESH JUICE COMPANY and HUGO POWELL, | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED DECEMBER 12, 1990

Motion: Joint Motion of Plaintiff Grove Fresh and Non-Party John Labatt for a Protective Order.

Docket Entry: Motion granted. Enter protective order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiff, | ) | No. 89 C 1113 |
| v. | ) | Judge Zagel |
| EVERFRESH JUICE COMPANY and HUGO POWELL, | ) | |
| Defendants. | ) | |

PROTECTIVE ORDER

Pursuant to stipulation by counsel for plaintiff and counsel for John Labatt, Inc., and upon their joint motion for a protective order, in order to provide protection of confidential and proprietary information and to facilitate discovery sought in this action.

IT IS HEREBY ORDERED:

1. John Labatt, Inc. and John Labatt Limited (collectively "Labatt") may designate documents that they consider to be of a confidential, proprietary or trade secret nature. Such designation can be made by applying a written statement such as "Confidential" or "Subject to Protective Order" on such documents. Such designation can also be made by Labatt informing other counsel in writing that certain documents or categories thereof are confidential. If Labatt has so informed other counsel of the confidential nature of documents, then the lack of a notation on documents shall not be considered a waiver of the right to seek protection of otherwise confidential information; however, the burden of avoiding confusion or mistake as to what is, or is not, confidential shall always remain with Labatt.

2. Documents designated as "confidential" shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process. If confidential documents are to be disclosed pursuant to law or court process, Labatt shall be given at least 10 days advance notice, before any party makes the disclosure, to afford Labatt an opportunity to object to such disclosure or to seek further appropriate relief.

3. If a party objects to the designation of any document as confidential, that party shall advise Labatt promptly, in writing, of the objections and the reasons therefor. In that event, all items so designated shall be treated as confidential material pending resolution of the dispute. If the parties involved fail to resolve the dispute among themselves, it shall be the obligation of Labatt to move promptly (i.e., within 10 days of the parties' failure to resolve the dispute among themselves) for a ruling from the Court concerning the confidentiality of the items in dispute. Nothing contained in this paragraph shall alter the burden of proof respecting the confidentiality of materials.

4. All confidential documents and materials containing confidential information designated by Labatt shall be returned to Labatt at the conclusion of this lawsuit.

STIPULATED AND AGREED:

/s/ John P. Messina
One of the Attorneys for Plaintiff

/s/
One of the Attorneys for
John Labatt, Inc.

ENTER:

JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | No. 90 C 5009 |
| Plaintiff, | ) | Judge Zagel |
| v. | ) | Filed Under Seal Pursuant to Court Order |
| JOHN LABATT LIMITED, a Canadian corporation; et al., | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED MAY 1, 1991

Motion: Agreed Motion for Entry of Protective Order.

Docket Entry: Motion granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
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| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiff, | ) | |
| | ) | No. 90 C 5009 |
| v. | ) | |
| | ) | Judge Zagel |
| JOHN LABATT LIMITED, a Canadian corporation; JOHN LABATT, INC., a California corporation; LABATT FOOD COMPANY, a division of John Labatt Limited; EVERFRESH, a division of Labatt Food Company; EVERFRESH, INC, a Michigan corporation, and EVERFRESH, INC., a Canadian corporation, jointly doing business as EVERFRESH JUICE COMPANY; AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation doing business as HOME JUICE CO.; DANIEL KOTOWICKI; ALBERT "ACE" ALLEN; MICHAEL ALLEN; and CHARLES JAMAIL, | ) | Filed Under Seal Pursuant to Court Order |
| Defendants. | ) | |

PROTECTIVE ORDER

This matter coming to be heard pursuant to stipulation by counsel for plaintiff and counsel for John Labatt Limited, John Labatt, Inc. and Everfresh, Inc., a Canadian Corporation ("Everfresh/Canada") (collectively "these defendants"), and upon these defendants' motion for a protective order, and in order to provide protection of confidential

and proprietary information and to facilitate discovery sought in this action,

IT IS HEREBY ORDERED:

1. A party (hereinafter referred to as a "Designating Party") may designate documents it considers to be of a confidential, proprietary or trade secret nature. Such designation can be made by applying a written statement such as "Confidential" or "Subject to Protective Order" on such documents. Such designation can also be made by the Designating Party informing other counsel in writing that certain documents or categories thereof are confidential. If the Designating Party has so informed other counsel of the confidential nature of documents, then the lack of a notation on documents shall not be considered a waiver of the right to seek protection of otherwise confidential information; however, the burden of avoiding confusion or mistake as to what is, or is not, confidential shall always remain with the Designating Party.

2. Documents designated as "confidential" shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process. If confidential documents are to be disclosed pursuant to law or court process, the Designating Party shall be given at least 10 days advance notice, before any party makes the disclosure, to afford the Designating Party an opportunity to object to such disclosure or to seek further appropriate relief.

3. If a party objects to the designation of any document as confidential, that party shall advise the Designating Party promptly, in writing, of the objections and the reasons therefor. In that event, all items so designated shall be treated as confidential material pending resolution of the dispute. If the parties involved fail to resolve the dispute among themselves, it shall be the obligation of the Designating Party to move promptly (i.e., within 10 days of the parties' failure to resolve the dispute among themselves) for a ruling from the Court concerning the confidentiality of the items in dispute. Nothing contained in this paragraph shall alter the burden of proof respecting the confidentiality of materials.

4. All confidential documents and materials containing confidential information shall be returned to the Designating Party at the conclusion of this lawsuit.

STIPULATED AND AGREED:

/s/ John P. Messina
One of the Attorneys for Plaintiff

/s/
One of the Attorneys for John Labatt, Inc. and Everfresh/Canada

ENTER:

/s/ James B. Zagel
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | CASE UNDER SEAL |
| Plaintiffs, | ) | No. 90 C 5009 |
| v. | ) | April 8, 1994<br>10:30 a.m. |
| JOHN LABATT LIMITED, a Canadian corporation, et al., | ) | Chicago, Illinois<br>Motion Heating |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

| | |
|---|---|
| For the Plaintiff: | RIVKIN, RADLER, BAYH, HART & KREMER, by<br>MR. DALE R. CRIDER<br>30 North LaSalle Street<br>Chicago, Illinois 60602 |
| For Defendant Everfresh: | MC DERMOTT, WILL, & EMERY, by<br>MR. JEFFREY E. STONE<br>227 West Monroe Street<br>Suite 3100<br>Chicago, Illinois 60606 |

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|---|---|
| For American Citrus: | BURDITT, BOWLES & RADZIUS,<br>by<br>MR. STEVEN M. KOWAL<br>333 West Wacker Drive<br>Suite 2500<br>Chicago, Illinois 60606 |
| ALSO PRESENT: | |
| For John Messina: | DAVIS, MINER, BARNHILL<br>& GALLAND, by<br>MR. JUDSON H. MINER<br>14 West Erie Street<br>Chicago, Illinois 60601 |
| Court Reporter: | Wanda L. Barnes<br>Official Court Reporter<br>219 South Dearborn Street<br>Suite 1918<br>Chicago, Illinois 60604<br>312- 435-5568 |

THE CLERK: 90 C 5009, Suppressed v. Suppressed.

MR. STONE: Good morning, Your Honor. Jeffrey Stone on behalf of the Everfresh defendants.

MR. KOWAL: Good morning, Your Honor. Steven Kowal on behalf of American Citrus, defendant.

MR. MINER: Jud Miner on behalf of John Messina.

MR. CRIDER: Dale Crider on behalf of Grove Fresh.

MR. MINER: Your Honor, this is our motion, and the reason I brought it was, as I explained, I guess it's been three or four weeks ago explained when we were here, in order to move this along we were going to get a bill of particulars concerning what it is that John had done which was in violation of the seal. Nothing has been forthcoming. This is all hanging over his head, and I thought this might be some way to get some direction and bring it -- part of it to an end, particularly since he has made it clear to the opposing counsel that he intends to talk to some people about other lawsuits and that there ought to be no question, but that he's free to use information he obtained independent of this litigation, and he's -- the seal was not a gag rule.

THE COURT: When does the briefing schedule end on the motion with respect to the violation, the alleged violation of the seal?

MR. MINER: Well, that ended a long time ago, Your Honor. We had gotten -- what I quoted in my motion is -- when I was in last time --

THE COURT: No. I mean is there a briefing schedule for you to answer their petition?

MR. MINER: No. We filed everything, I believe, that --

MR. STONE: Here's where we are, Judge. We're scheduled -- it's in our court to take Mr. Messina's deposition.

THE COURT: Right. That's right.

MR. STONE: And what has happened is Mr. Stetler was out of town on vacation, I've been out of town on vacation, we're both back n town, and we'll schedule that promptly.

THE COURT: Let me tell you my initial thoughts on your motion for clarification.

It was represented to me several times during the course of this case that much of what was talked about in court and much of what was pled in various complaints, whether or not they should have been allowed -- that remained without being stricken, leaving that aside, it has always been alleged to me that much of what was said was already in the pubic record in some form or another, that the Food & Drug Administration had looked at certain things and a bunch of other stuff, and in fact that did become a factor of sorts with respect to an intervenor who urged before me some urgent necessity to examine what was in the court file. And part of the response that the parties have made to this intervenor was go to the public files, see what it is that you wish to see.

So as a general proposition, if there is something in a public file, I don't know that there is any basis for restraining Mr. Messina from uttering those things which are in the public file.

However, and in this case it's a substantial however, Mr. Messina has, it is alleged before me -- and on some occasions it's more than allegations because it happened in court, Mr. Messina has not always been entirely clear in his descriptions to me and perhaps even in his own mind as to what is in the public record and what is not otherwise in the public record and what had been discovered in the course of discovery and which is sealed here.

And the difficulty I have in saying to you --- certainly this clarification is one that you're entitled to -- is that my past experience

with Mr. Messina leads me to believe that I will then engage in a lengthy set of hearings in which we will have to carefully patrol the border between what came out of the court file and what's in otherwise a public arena, and I don't want that to occur. I don't think it's good for this case. I don't think it's good for Messina. I think it will increase everybody's costs.

So my answer to you is that I would advise Mr. Messina not to speak about the case and what might possibly transgress the seal with anybody until we resole the question of his alleged prior violation of the seal order.

Now, I recognize that there may be circumstances in which there is some urgent need for him to consult, and if that occurs, it would be appropriate for him to come in with a petition saying I want to consult with so and so. In fact, I don't even think he has to say who it is he wishes to consult with, but I think he does have to tell me what it is that he wishes to say, and it would be very helpful if he comes in with such a petition, he delineates with chapter and verse what his public record source of these statements are.

Now, ordinarily this would not give me a problem, but I don't want to sit here unless I absolutely have to and decide whether something in an FDA file is or is not the exact equivalent of what Mr. Messina may or may not have said to someone else.

So basically it would be best if he spoke to no one about these matters until we resolve the question of his liability for violating the seal on the one alleged -- or two or three alleged violations that have already occurred without creating a problem for possible violations that I may also have to deal with. And the safety valve that I think I'm giving is that if he wants to show exactly what is in the public record and indicate that this is exactly what he wants to say, that's possible too, because I recognize it may be necessary for him to speak more quickly.

It also is a reason why we ought to move as expeditiously as possible to get at least the question of breaking the seal resolved.

And that's my response to your motion. So I guess in a sense I've granted your motion to clarify. I don't know that you're entirely pleased with the clarification, but I really think given Mr. Messina's history, that it's best for him, best for this case, and certainly best in terms of consuming time with this Court that he hold his piece until the matter here is over, and I've given the one escape hatch in case that that's prejudicial to someone else's rights.

MR. MINER: Well, I would represent that he -- and I don't know how you'd want us to go about doing this -- he is going to talk to some people about representing them. And I -- and time is important. It's not something you can weight.

They can say what they want. I've been trying to get this resolved and bring it to a head now for months. We've gotten nowhere.

THE COURT: Then I don't see a difficulty, because if Mr. Messina intends to do that and he also intends to honor the sealing order --

MR. MINER: We will live with it. Our concern is simply --

THE COURT: Then what I suspect that what he ought to do, the single thing he ought to do is do something very similar to what the government does when they grant use immunity to someone, which is they carefully put in a nice sealed filing every piece of evidence that they had before the individual testified so if disputes arise later out of a question of whether the government did or did not know something before the individual testified, they have established what it is. And I believe it would be appropriate for Mr. Messina to do the same thing with respect to the public record and to file whatever it is that he has and perhaps seal it, or unseal it. It's up to him. And I don't mean seal in the legal sense of sealing a record; I mean sealing in the sense of applying adhesive to an envelope.

He can file either an open envelope or a closed envelope with that data in it.

I'm also concerned, to borrow another aspect of criminal procedure to apply here, I'm also concerned that if he's not extremely careful I'll be looking at the civil equivalent to Wong Sun v. United States and I will be dealing with fruits of a poisonous tree and we will have even a lengthier hearing than the one that I anticipating [sic] having.

Mr. Stone, you were about to say something?

MR. STONE: Judge, if I could just interject on the use immunity question. I understand your point, but I'm not sure that it really works here.

The problem is Mr. Messina has obtained certain information through the course of the pending litigation. If he were to inventory that or seal it or recite it in some recorded fashion as you would do to avoid a Kastigar problem on the criminal side, that would show that he obtained the information -- in the Kastigar problem you want to show that you didn't obtain the information from the person you have immunized.

THE COURT: Right.

MR. STONE: Here the fact that Mr. Messina has obtained it form the public record or from a current case, if he goes out and looks for the same information in a subsequent case, the sealing isn't going to in some way sanitize what he does.

THE COURT: No, which is why I raised -- maybe the appropriate case is Wong Sun.

MR. STONE: I mean I think that's exactly where we are. The reason I spoke is because I see a very serious problem that we would raise along the Wong Sun lines to the extent that Mr. Messina -- to which Mr. Messina uses information from this case in another case in violation of the seal order, which is still being litigated. Whether he has sealed it in your sense or not isn't going to make a difference. There is still going to be a taint problem.

THE COURT: And Mr. Stone makes a good point.

MR. MINER: Well, I don't do criminal work and I don't get the point. As I understand it --

THE COURT: -- tells you about all you need to know, to which your response, using the same rule and talking about public information, is to invoke the doctrine of inevitable discovery.

MR. MINER: We're not -- as I understand it -- and maybe I'm wrong in this whole thing. You know, we -- and it may get resolved if they ever get around to giving us this bill of particulars and telling us what beyond -- what they're able to -- I assume they brought forth their biggest guns when they filed their motion to sanction him and I have quoted that, and I am in all honesty completely mystified as to how anything in those four paragraphs violates any seal.

Now, there may be more lurking out there, and they'll tell us and we'll know.

I assume John takes the risk. He has to be able to establish that a lot of this factual stuff, the chemical stuff, which apparently was a big flap in this case and everyone acknowledged it was public information, it wasn't subject to any protections, is public record.

He's going to have to be able to justify that the information that he's using is information he got outside discovery. If he steps across the line, he can be sanctioned. But the alternative is to say we've imposed this gag order on you and --

THE COURT: No, no. That's not actually the alternative. The alternative is to wait until we get some kind of resolution, because the point Mr. Stone is making is if they give you a bill of particulars and they say Mr. Messina has violated the seal order in the following eight instances, that does not solve the problem of future conversations. And the reason it doesn't solve the problem of future conversations is because there might be two dozen ways in which you can violate the seal order, and he might violate the seal order in ways that he didn't violate it allegedly the first time.

So the difficulty is that by speaking and by saying, look, this is all public information and, ergo, I can't be kept from saying anything -- kept from saying anything about it is that we're then going to have a lengthy debate not only about whether it is in fact public information, but there's probably going to be some confusion about the exact words that Mr. Messina used, and the exact words in these areas I think are very important, and it is not -- it's happened before me several times where somebody takes a look at a public document and says this is all I said, and you listen to them and that's not all they said.

MR. MINER: I guess what I --

THE COURT: They said something else, or they made inferences that they -- they took the facts that were in the public document and they didn't exactly say what was in the public document, and that's why I'm concerned, because then we're going to have another lengthy debate about whether the exact words Mr. Messina used are in the public record or whether it was part of the seal order.

And the profound difficulty here is it's very difficult to erase from your mind what it is that you already know, and it's quite likely -- at least it's quite risky that Mr. Messina may think that he's speaking from the public document, but because he hasn't laid out very carefully what it is he learned from each source, he's going to transgress the order, and then we're going to have arguments about exactly what does fall within disclosure and what doesn't fall within the disclosure, and I don't want to get involved in that.

But the fact of the matter is I can't assign anybody to follow Mr. Messina around, and what Mr. Messina says is what Mr. Messina says. What I am doing is I'm granting your motion for clarification and I'm giving you and your client through you a warning about the further difficulties that might very well be created.

To simply say, look, the judge said you can talk about whatever it is that you learned independent of this case is very, very cold comfort for Mr. Messina; and were I in his position I would not be charging ahead saying, well, thank God that dispute is over, because in my judgment given both my knowledge of Mr. Messina and what

happens in other cases which he's not involved, it just means the possibility that we're going to have more and expensive hearings.

MR. MINER: Let me -- I guess one thing that confused me a little bit is -- I misunderstood I guess the role of the hearing. Obviously the hearing only focuses on what's transgressed up till now, and I sort of assumed the conclusion is if in fact he hasn't breached the seal, there's no reason to assume he's going to do it in the future. On the other hand, once that hearing is over, it has no bearing on the future. So --

THE COURT: But actually it does.

MR. MINER: How does it --

THE COURT: It does have a bearing on it.

MR. MINER: Assuming he -- let's say there is no basis for concluding that he didn't breach the seal.

THE COURT: But let's say I find that he did breach the seal.

MR. MINER: Okay. If that is so, we'll find that out.

THE COURT: What happens if he breaches it a second time?

MR. MINER: It would be appropriate to impose a more severe sanction on him.

THE COURT: Yes.

MR. MINER: I don't have any doubt of that. But the point is at some point he's -- you know, a seal has a limited purpose, and they have -- as I understood it, at some point they're supposed to come back and dissect what actually belongs under seal and what doesn't. Nobody has gone to the trouble of doing any of that. And that's all going to have to be done.

MR. STONE: Can I speak to two points on that, Judge?

THE COURT: Sure.

MR. STONE: This case -- the seal issue is still pending before the Seventh Circuit. The Seventh Circuit hasn't ruled on that.

THE COURT: Right.

MR. STONE: So there is nothing currently pending on what needs to be done with the seal order that you imposed. That's the first point.

The second point, which we're not discussing because it's not formally part of Mr. Miner's motion, but there are confidentiality provisions that were invoked by the settlement in this case. So there is another layer of confidentiality here separate and apart from the seal.

Now, I don't know --

MR. MINER: Separate and apart. That's the --

MR. STONE: I don't know whether Mr. Miner agrees that his client is bound by any provisions of the settlement agreement -- he's been on both sides of that issue -- but our position is that John Messina is clearly bound by the confidentiality terms of the settlement agreement.

THE COURT: Which is fine for you to say, but my assumption is that Mr. Miner knew that and did not file a motion for clarification of the meaning of the settlement agreement because there is no possible way at this stage --

MR. STONE: I --

THE COURT: -- that that's not clear.

MR. MINER: That's a separate issue.

THE COURT: Right.

MR. STONE: I will accept that Mr. Miner knew that and that this is a separate issue.

THE COURT: Right.

MR. STONE: But then we get into the things that were in the current motion, such as the weight to be given the circumstantial evidence or the conclusions that can be drawn from the fact that certain witnesses invoked the Fifth Amendment.

First of all, it's wrong, and we repeatedly told Mr. Miner that the recitation of the witnesses who claimed the Fifth Amendment is wrong. There were discussions about people taking the Fifth Amendment, but they were never actually brought into a deposition where they were asked specific questions and you could draw the inference. The picture was never completed as to several of these witnesses.

You're exactly right, Judge. We're going to have major battles over what words were used and what inferences were drawn and whether or not it was a conclusion, a legitimate or logical conclusion to be drawn from the public record. I think we're opening Pandora's box.

THE COURT: Well, we've said whatever we have said. I will see you again soon enough.

Meanwhile I would like to see Mr. Miner and Mr. Stone at side bar for a moment.

* * * * * * * * * * * * * * * * * * * * *

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

/s/ Wanda L. Barnes — 4/15/94

Official Court Reporter — Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
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| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiffs, | ) | No. 90 C 5009 |
| v. | ) | Honorable James B. Zagel |
| JOHN LABATT LIMITED, a Canadian corporation, et al., | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION AND ORDER
CONTAINING FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The perfect tragic figure, according to Aristotle, is "a man not preeminently virtuous or just, whose misfortune, however, is brought upon him not by vice and depravity but by some error of judgment. . . ." Aristotle, The Poetics 238 (Friedrich Solmsen ed & Ingram Bywater trans., Modern Library 1954). The great heroes of tragedy conformed to the Aristotelian conception of a great man whose unkind fate is precipitated by a tragic "flaw" in his personality. Thus, Othello's downfall was the result of his own jealousy, MacBeth fell victim to his blinding ambition, Lear's insecurity prompted his misfortunes, and Hamlet's tragedy was that of a man who could not make up his mind. John Messina fits the mold of the great tragic figure. His is the tragedy of an attorney who could not keep a confidence.

The confidences Mr. Messina could not keep were protected by court orders of confidentiality. Mr. Messina's past behavior played a pivotal role in the granting of these orders, since it appeared that he

would go to any lengths to try his case on the courthouse steps rather than in the courtroom itself. That Mr. Messina sincerely, even fervently, believed in the unremitting badness of the defendants in this case is beyond doubt, as was his willingness to hurt them by disseminating information for purposes of damaging them outside the walls of the courtroom. The orders of confidentiality were meant to prevent Mr. Messina's misuse of the litigation to pursue his own agenda. But the evil to be prevented by the orders was the evil that actually ensued.

Undeterred by repeated court warnings, possible harm to his client's interests, and, apparently, his own fate, Mr. Messina continued to disclose protected information. His propensity to reveal court protected secrets is the Aristotelian flaw which precipitated his present predicament: possible sanctions for contempt and for violations of Rule 11. Mr. Messina stands accused not only of violating this court's orders of confidentially [sic], but for failing to appear in court as ordered and for making misrepresentations to the Seventh Circuit Court of Appeals. Since the "first essential, the life and soul, so to speak, of Tragedy, is the plot," id. at 232, some history is in order.

Background

Mr. Messina represented the plaintiff, Grove Fresh Distributors, Inc., in two separate but related suits filed against competing orange juice manufacturers for allegedly engaging in a conspiracy to unlawfully adulterate and misbrand orange juice in violation of various federal laws.

Grove Fresh filed the first suit against Everfresh Juice Company in 1989 (Grove Fresh Distributors v. Everfresh Juice Co., No. 89 C 1113)[1/] The genesis of the second suit (Grove Fresh Distributors, Inc. v. John Labatt, Ltd., No. 90 C 5009) began when Mr. Messina concluded that Grove Fresh had claims against John Labatt, Ltd. -- the parent of Everfresh -- similar to its claims against Everfresh. Mr. Messina sent Everfresh's counsel a demand letter

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[1/] This case was eventually dismissed pursuant to the defendants' successful motion for summary judgment in February of 1992.

seeking payment of claims on 23 August 1990. The letter gave notice that Mr. Messina would file a new complaint on behalf of Grove Fresh if Labatt did not settle.

On 24 August 1990, Labatt presented an emergency motion to seal the new complaint described in Mr. Messina's letter, arguing that the new complaint was an illegitimate attempt to amend the complaint in case No. 89 C 1113 (then 18 months old and nearing the close of discovery). Contending that Grove Fresh's motive in filing this new complaint was "to evade and disregard the earlier rulings made by this Court" in case No. 89 C 1113 on procedural issues and the discovery schedule, Labatt prayed for an order "requiring Grove Fresh to immediately submit its new complaint to this court under seal."

On 29 August 1990 I granted the motion to seal the complaint for case No. 90 C 5009. A key reason behind this decision was Mr. Messina himself. After presiding for the previous eighteen months over case No. 89 C 1113, I was familiar with certain tactics employed by Mr. Messina which I believed were questionable if not reprehensible. Specifically, I was wary of Mr. Messina's repeated attempts to beat the defendants into submission by disclosing materials previously designated as confidential to generate unfavorable publicity for them.[2/] I had no reason to believe Mr. Messina would change his methods and every reason to suspect he would attempt to try his latest suit on the courthouse steps as well.

Given the relatedness of the two cases and their litigants, and my familiarity with both, I felt it unnecessary to reiterate in my sealing order for the new case what seemed painfully clear from the lessons,

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[2/] Especially alarming was Messina's propensity to disregard court orders and include documents designated as confidential as attachments to his pleadings (which would then be put into the public record or forwarded to the press). An emergency motion seeking to restrain Messina from making prohibited disclosures would inevitably follow. See e.g., Minute Order of 10/3/90 Ordering Messina Not to Publish His 10/1/90 Letter to the Press and Ordering Him to Comply With the Court's Ruling; Minute Order of 7/18/90 Granting Motion to Enforce Protective Order in 89 C 1113.

and record, of No. 89 C 1113. The minute order granting the seal in No. 90 C 5009 therefore simply stated:

> Defendants' motion to file case under seal is granted. The complaint and all subsequent pleadings shall be filed under seal until further order of court.

Three days later I heard arguments regarding a motion by Grove Fresh to lift the seal. After a brief colloquy, I stated that the "motion to lift the seal is denied without prejudice to you raising it after we deal with whatever pretrial motions there are with respect to dismissing the complaint." I later denied various motions to dismiss the case, but did not explicitly refer to the emergency motion to seal.

On 1 May 1991 I signed a stipulated protective order "in order to provide protection of confidential and proprietary information and to facilitate discovery."[1] As Grove Fresh's attorney at the time, and

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[1] This protective order, similar if not identical to one entered in the earlier case, read as follows:

IT IS HEREBY ORDERED:

1. A party (hereinafter referred to as a "Designating Party") may designate documents it considers to be of a confidential, proprietary or trade secret nature. Such designation can be made by applying a written statement such as "Confidential" or "Subject to Protective Order" on such documents. Such designation can also be made by the Designating Party informing other counsel in writing that certain documents or categories thereof are confidential. If the Designating Party has so informed other counsel of the confidential nature of documents, then the lack of a notation on documents shall not be considered a waiver of the right to seek protection of otherwise confidential information; however, the burden of avoiding confusion or mistake as to what is, or is not, confidential shall always remain with the Designating Party.

2. Documents designated as "confidential" shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process. If confidential documents are to be disclosed pursuant to law or court process, the Designating Party shall be given at least 10 days advance notice, before any party makes the disclosure, to afford the Designating Party an opportunity to object to such disclosure or to seek further appropriate relief.

therefore a signatory to the order, Mr. Messina agreed that "[d]ocuments designated as 'confidential' shall be used only for the preparation and trial of this lawsuit, and for no other purpose except as may be required by law or court process."

On 9 October 1991, intervenors in the case moved to vacate the seal. Ordering a fresh round of briefs on the seal's merits, I offered the defendants another chance to justify the seal and identify what it wanted to protect. On 29 November, Everfresh argued that the seal:

> was originally ordered in the 90 case at Everfresh's request because plaintiff had threatened to file the action in the public record, if Everfresh did not pay a multimillion dollar settlement, with unsubstantiated scandalous allegations that would damage the reputation of Everfresh and others. Plaintiff's pleadings also incorporate and attach protected confidential information obtained through discovery. Had this court not placed the 90 case under seal, the unsubstantiated, scandalous allegations and information that were subject to the protective order would have been improperly disseminated into the public realm.

I agreed with the premise of this argument. On 20 November 1992, in an order partially granting intervenors' motion, I stated on the record that "the seal order in 90 C 5009 served to effectuate the purposes of the protective order entered in the earlier case," No. 89 C

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3. If a party objects to the designation of any document as confidential, the party shall advise the Designating Party promptly, in writing, of the objections and the reasons therefor. In that event, all items so designated shall be treated as confidential material pending resolution of the dispute. If the parties involved fail to resolve the dispute among themselves, it shall be the obligation of the Designating Party to move promptly (i.e., within 10 days of the parties' failure to resolve the dispute among themselves) for a ruling from the Court concerning the confidentiality of the items in dispute. Nothing contained in this paragraph shall alter the burden of proof respecting the confidentiality of materials.

4. All confidential documents and materials containing confidential information shall be returned to the Designating Party at the conclusion of this lawsuit.

1113.[4] Thus did I seek to incorporate by reference the protective order in the older case as a justification for the seal in the newer one.

I also put into the record my feeling that lifting the seal on the entire case was problematic, because the existence of the seal may have led the parties to believe that they could file papers containing discovery material that would not otherwise properly be put before the court. Another problem with lifting the seal stemmed from the nature of the complaint. As I said in the order,

> the complaint in this case contains allegations which would, if not filed in court and if untrue, be libelous. Some of those against whom allegations are made are not parties to the record and can never secure vindication. The business records, furthermore, contain information which the law customarily protects [such as] speculation and the unproved, untested conclusions in pleadings filed by lawyers under the loose requirements of Federal Rules of Civil Procedure 8 and 9.

On 21 January 1993, Grove Fresh discharged Mr. Messina as its attorney in the Grove Fresh litigation. On 29 April 1993, case No. 90 C 5009 was dismissed with prejudice pursuant to settlement.

Then on 1 June 1993 intervenors renewed their motion to vacate the seal. This was denied. Intervenors appealed parts of this denial, which included the issue of whether this court should have issued a decision on the record justifying the seal.

In remanding the case back to me, the Seventh Circuit reiterated that it had yet to find "reversal per se appropriate" where a court had not made a point of articulating its findings and reasoning for entering an order limiting access. Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994). The Court of Appeals asked "only that in reaching its decision in this matter on

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[4] The stated purpose of that protective order, as well as its counterpart in No. 90 C 5009, was "to provide protection of confidential and proprietary information and to facilitate discovery. . . ."

remand that the district court specify the basis for its conclusions." Id. at 899. This decision was issued on 12 May 1994.

Continuing disclosures by Messina in apparent violation of the orders of confidentiality, and the motions that would inevitably follow to try and rein him in, gave me ample opportunity to follow the Court of Appeals request and elaborate for the record the seal's rationale. The first chance I had to do this was actually one month prior to the issuance of the Seventh Circuit's opinion. On 8 April 1994, acceding to Mr. Messina's request to clarify the seal order's scope, I discussed the reasons behind my orders of confidentiality at some length:

> Mr. Messina has not always been clear in his descriptions to me and perhaps even in his own mind as to what is in the public record and what is not otherwise in the public record and what had been discovered in the course of discovery and which is sealed here.
>
> . . . [M]y past experience with Mr. Messina leads me to believe that I will then engage in a lengthy set of hearings in which we will have to carefully patrol the border between what came out of the court file and what's in the public arena, and I don't want that to occur. I don't think it's good for the case. I don't think its good for Mr. Messina. I think it will increase everybody's costs.
>
> So my answer to you is that I would advise Mr. Messina not to speak about the case and what might possibly transgress the seal with anybody until we resolve the question of his alleged prior violation of the seal order.

To safeguard undue prejudice to anyone's rights, I laid out a process by which Mr. Messina should proceed before making any future disclosures.

> Now I recognize that there may be circumstances in which there is some urgent need for him to consult, and if that occurs, it would be appropriate for him to come in with a petition saying I want to consult with so and so. In fact, I

don't even think he has to say who it is he wishes to consult with, but I think he does have to tell me what it is that he wishes to say, and it would be very helpful if he comes in with such a petition, he delineates with chapter and verse what his public record source of these statements are.

So, basically it would be best if he spoke to no one about these matters until we resolve the questions of his liability for violating the seal on the one alleged -- or two or three alleged violations that have already occurred without creating a problem for possible violations that I may also have to deal with. And the safety valve that I think I'm giving is that if he wants to show exactly what is in the public record and indicate that this is exactly what he wants to say, that's possible too, because I recognize it may be necessary for him to speak more quickly.

It also is a reason why we ought to move as expeditiously as possible to get at least the question of breaking the seal resolved.

And that's my response to your motion. So I guess in a sense I've granted your motion to clarify. I don't know if you're entirely pleased with the clarification, but I really think, given Mr. Messina's history, that its best for him, best for this case, and certainly best in terms of consuming time with this Court that he hold his piece until the matter here is over, and I've given the one escape hatch in case that that's prejudicial to someone else's rights.

And the profound difficulty here is it's very difficult to erase from your mind what it is that you already know, and it's quite likely -- at least it's quite risky that Mr. Messina may think that he's speaking from the public document, but because he hasn't laid out very carefully what he learned from each source, he's going to transgress the order and then we're going to have arguments about exactly what does fall within disclosure and what doesn't fall within the disclosure, and I don't want to get involved in that.

I sought to put Mr. Messina on his guard by giving him notice of the consequences that would follow any future transgressions:

> But the fact of the matter is I can't assign anybody to follow Mr. Messina around, and what Mr. Messina says is what Mr. Messina says. What I am doing is I'm granting your motion for clarification and I'm giving you and your client through you a warning about the further difficulties that might very well be created.[2/]
>
> To simply say, look the judge said you can talk about whatever it is you learned independent of this case is very, very cold comfort for Messina; and were I in his position I would not be charging ahead saying, well, thank God that dispute is over, because in my judgment given both my knowledge of Mr. Messina and what happens in other cases in which he's not involved, it just means the possibility that we're going to have more and expensive hearings.

Even Mr. Messina's then counsel recognized the danger in further disclosures when he expressly agreed with the propriety of increased sanctions:

> THE COURT: What happens if he [Mr. Messina] breaches it [the sealing order] a second time?
>
> MR. MINER: It would be appropriate to impose a more severe sanction on him.
>
> THE COURT: Yes.
>
> MR. MINER: I don't have any doubt of that.

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[2/] Although my comments were directed to an absent Mr Messina through his counsel, there is no doubt that they were subsequently read by Mr. Messina, who cited the transcript himself in a letter, dated 20 September 1994, sent to counsel for an intervenor. Mr. Messina admitted in deposition that he had reviewed, understood, and previously discussed the 8 April transcript prior to sending the letter. See infra part B.2.

It was not long after this that Mr. Messina once again made disclosures which appeared to violate my orders of confidentiality, and did so, moreover, without following the specific procedure I had laid down on 8 April. Thus on 27 October 1994 I reiterated for the record the relationship between the orders and Mr. Messina's own behavior:

> . . . [T]he principal basis for the decision [to impose the sealing order] was the [sic] that I had litigation before me in which I had a lawyer for the plaintiff, Mr. Messina, who was convinced -- I don't know about the justice of his own client's cause, but convinced beyond a shadow of a doubt, indeed the possibility of a doubt, of the badness of the defendants. And it also seemed to me that Mr. Messina was willing to use not the force of the law, but the force of public relations to beat the defendants into some sort of submission . . .
>
> . . . .
>
> But most of what we could do here depends on the fact that lawyers go about lawyer's business, and they serve their clients rather than their own principal concerns, and that they generally obey orders of court and custom and practice of lawyers regarding discovery materials.
>
> I gained an impression of Mr. Messina very early on that he was not likely to follow the well trod paths of custom. Indeed, I thought Mr. Messina might in fact be reluctant to obey court orders. One of the reasons that the sealing order was so broad was my concern that Mr. Messina would ignore any order that was not broad.

After reading a round of briefs on the continued advisability about keeping case materials sealed, and after engaging in a document-by-document review of all materials under seal and subject to the protective order (a time consuming task given the sheer amount of materials generated during the four plus years of litigation), I asked intervenor's counsel, on 21 November 1994, to draft an order to unseal the case pursuant to my orally stated directions. On 1 February 1995, I ordered the file unsealed.

But although the case was unsealed, I was still faced with documents protected by a valid protective order, as well as confidential materials filed in reliance of the seal. My in camera inspection revealed that for some of these materials continued confidentiality was appropriate.[6/] I therefore ordered the particularized redactions of certain words, phrases, names, etc., while allowing public access to most, if not all, of the documents in which the redactions were made.

In response to Mr. Messina's conduct during the course of the litigation, American Citrus Products Corp., and John Labatt Ltd., the defendants in the case, jointly petitioned the court for a finding of contempt and for other sanctions against Mr. Messina. On 3 February 1995, a hearing was held to afford Mr. Messina an opportunity to respond to the following charges:

First, that Mr. Messina is in contempt of court for repeatedly violating the seal and protective order of the 1990 case by his disclosure of confidential discovery materials in a brief filed with Seventh Circuit; in a letter to counsel for intervenors; and in a conversation to a reporter for the New York times.

Second, that Mr. Messina is in contempt of court for failing to appear before me when directed to do so, a nonappearance for which I had previously issued a rule to show cause.

Third, that Mr. Messina is subject to Rule 11 sanctions for allegedly making false or misleading representations to the Court of Appeals regarding his status as Grove Fresh's attorney.

Defendants jointly pray that Mr. Messina be substantially fined, required to reimburse them for legal fees and costs incurred from his actions, ordered to refrain from further comment, and required to

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[6/] These consisted of commercially disparaging designations; references to alleged co-conspirators not named as defendants; discovery materials and revealing references to them; post-settlement proceedings; and confidential agreements (i.e., the settlement agreement) that would not have been filed but for the existence of a seal.

deposit with the court a substantial sum of money which would be forfeited by subsequent disobedience.

Contempt: Civil and Criminal

"The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." Young v. U.S. ex. rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987). Without such authority, the courts would be helpless in the face of open defiance of their orders:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.

Id., quoting Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911).

The nature of contempt may be civil, criminal, or both. The enforcement of an order through a civil contempt action is designed to serve either of two purposes: (1) to compel or coerce obedience to a court order; or (2) to compensate the parties for losses resulting from the contemnors non-compliance with a court order. United States v. United Mine Workers of America, 330 U.S 258, 303-04 (1947).

While the purpose of civil contempt is essentially remedial, Shakman v. Democratic Organization of Cook County, 533 F.2d 344, 349 (7th Cir. 1976), the purpose of criminal contempt is primarily punitive, "to vindicate the authority of the court." U.S. v. Bayshore Associates, Inc., 934 F.2d 1391, 1400 (6th Cir. 1991), citing Gompers, 221 U.S. at 441. The same conduct may be subject to both criminal and civil contempt sanctions. Id.

To support a federal civil contempt conviction, it must be proved: "(1) that the court entered a lawful order of reasonable specificity; (2) the order was violated." Matter of Betts, 927 F.2d 983,

986 (7th Cir. 1991). Criminal contempt requires an extra element be shown: "(3) the violation was willful."[7] Id. A jury trial and a standard of reasonable doubt are required for criminal contempt charges.[8] Young, 481 U.S. at 798-99. The elements of civil contempt must be established by "clear and convincing evidence."[9] Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989).

The critical features in determining whether contempt is civil or criminal are the substance of the proceeding and the character of the relief that the proceeding will afford. Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 631 (1988). "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But

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[7] While it is not necessary in instances of civil contempt for the petitioner to establish that the defendant's violation of the order was willful, McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949), evidence of "willful and intentional conduct is relevant to determine the appropriate remedial relief." Connolly v. J.T. Ventures, 851 F.2d 930, 935 (7th Cir. 1988).

[8] In the recently decided International Union, United Mine Workers of America v. Bagwell, 114 S. Ct. 2552 (1994), the Supreme Court suggested that in criminal contempt sanctions, the right to a jury trial and proof beyond a reasonable doubt were now required for (1) "serious" criminal contempts involving imprisonment of more than six months; (2) indirect contempts involving out-of-court disobedience to complex injunctions (especially if elaborate and reliable factfinding is required), and which neither obstruct the court's ability to adjudicate nor pose substantial risk of deprivation from lack of a neutral factfinder; (3) "serious" fines (i.e., $52 million); and for (4) fines related to widespread, ongoing, out-of-court violations of a complex injunction, thereby making the court police the compliance with an entire code of conduct that the court itself has imposed. Id. at 2556-63.

[9] Civil contempt sanctions, or those penalties designed to compel future compliance with a court order, do not require a jury trial -- just notice and the opportunity to be heard -- if (1) the fine is compensatory and coercive (rather than merely punitive); (2) the fine is not compensatory, as long as it is petty and/or the contemnor is afforded the opportunity to purge; (3) the conduct occurring outside the court's presence impeded its ability to adjudicate the proceedings before it; and (4) the indirect contempts involve discrete, readily ascertainable acts requiring little need for extensive, impartial factfinding. Bagwell, 114 S.Ct. at 2557-62.

if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." Id., quoting Gompers, 221 U.S. at 441.

The line between civil and criminal contempt, however, is often blurred since

> both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial court order, but it is also seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.

Id. at 635.

Courts have broad discretion in choosing the means to grant such relief. See McComb, 336 U.S. at 193. This includes awarding attorney's fees and costs for preparing and prosecuting a contempt petition, and such fees may include factors such as overhead and support personnel. Matter of Establishment Inspection of Microcosm, 951 F.2d 121 (7th Cir. 1991), citing Illinois v. Sangamo Constr. Co., 657 F.2d 855, 862 (7th Cir. 1981); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 748 (7th Cir. 1976).

## A. The Orders of Confidentiality[10/]

At issue before me are three instances where it is alleged that Mr. Messina made prohibited disclosures: in a letter, in a legal brief filed with the Seventh Circuit, and in a conversation to a New York Times reporter. That Mr. Messina made the disclosures at issue is not contested; only that the disclosures violated the orders of confidentiality and therefore are subject to sanctions for contempt.

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[10/] The 1990 case was subject to both a sealing order and a protective order. The simultaneous use of a seal and a protective order is not unusual See e.g., Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 158-59, 167 (3d Cir. 1993). While there is a definite overlap between the two types of orders in terms of the prohibition on the dissemination of content, the two are technically different, although the terms are often used interchangeably. See Brian T. FitzGerald, Note, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J. L. & Pol. 381, 382 n. 7 (1990) (using "confidentiality orders," "protective orders," and "sealing orders" interchangeably throughout the text).

Under Local Rule 10(c), the court "may on written motion and for good cause shown enter an order directing that one or more documents to be used in a proceeding be suppressed. . . ." A "suppressed document" is "a document or an exhibit filed in a proceeding in this Court to which access has been restricted either by a written order, including a protective order. . . ." Local Rule 10(a)(1).

A "protective order" is "an order which provides that certain documents or exhibits to be filed with the court at a future date may be filed as suppressed or sealed documents as determined by the order." Local Rule 10(a)(5).

A "sealed document," on the other hand, is "a suppressed document which the court has directed to be maintained within a sealed enclosure such that access to the document requires breaking the seal of the enclosure." Local Rule 10(a)(2).

While the purpose of both orders is to ensure confidentiality, a seal order can be seen as more sweeping and inclusive if the entire case is ordered sealed. See FitzGerald, Sealed v. Sealed, at 382 n.7, 383 & n.10, (distinguishing as "total sealing orders" those orders that make the entire record of a proceeding confidential -- the identity of the parties, all pre-trial discovery material, the contents of the pleadings, etc.).

In the present instance, there was both a protective order for documents designated as confidential and a seal on the entire case. I have therefore tried, despite their overlap in effect and purpose, to analyze the two types of orders separately. I may, however, refer to them collectively as orders of confidentiality.

Mr. Messina has raised several general defenses to the contempt charges regarding the disclosures at issue, both in his briefs and during his testimony at the contempt hearings. These have to do primarily with the scope and interpretation of the orders of confidentiality; the First Amendment; and the underlying validity of the orders. To give context to the cited incidents of ostensibly contemptuous conduct, and for the sake of prolepsis, I examine the scope, constitutionality, and validity of the orders before addressing the specific acts in question.

1. Scope

Mr. Messina's primary defense is his assertion that the scope of the orders of confidentiality was so limited that neither the protective order nor the seal prohibited his disclosures. According to Mr. Messina, the protective order prohibited the dissemination of very little. Mr. Messina testified that he did not understand the protective order to prohibit him from revealing the contents of pleadings. Nor from revealing confidential discovery information such as answers to interrogatories nor answers to requests to admit. Nor from disclosing the deposition testimony of witnesses. Nor from disseminating the contents of documents marked "confidential."

Mr. Messina's interpretation of the seal order is similarly cramped. Mr. Messina testified that he did not understand the seal order as preventing him from revealing the contents of depositions under seal, other discovery materials under seal, or quoting verbatim from sealed materials. The only thing that Mr. Messina believed the sealing order actually prohibited was the public disclosure of the actual pleadings -- the physical documents themselves -- filed in the case.

A determination of contempt requires an order of "reasonable specificity" which has been violated. Matter of Betts, 927 F.2d 983, 986 (7th Cir. 1991). Whether an order is reasonably specific is "a question of fact to be resolved with reference to the context in which the order is entered and the audience to which it is addressed." Id., quoting United States v. Purstyn, 878 F.2d 1322, 1324 (11th Cir. 1989).

Vital to the context in which the orders of confidentiality were entered was Mr. Messina's propensity to generate adverse publicity for the defendants by disclosing protected materials in order to get them to settle. I had observed this behavior firsthand over a course of almost two years in the initial Grove Fresh suit, No. 89 C 1113, and I watched as this familiar pattern played itself out in No. 90 C 5009. Also vital is the audience to whom the orders were addressed. Matter of Betts, 927 F.2d at 986. See also United States v. Cutler, 815 F. Supp. 599 (E.D. N.Y. 1993), citing United States v. Turner, 812 F.2d 1552, 1565 (11th Cir. 1987). When the audience is a member of the bar, that fact will be taken into account in determining reasonable specificity , and orders that would otherwise require greater specificity for a layperson will require less for a lawyer. See, e.g., Cutler, 815 F. Supp. at 607; Turner, 812 F.2d at 1565 ("it may well be necessary that the specificity of orders directed to laypersons be greater than that of orders to lawyers").

Mr. Messina earned a bachelor of arts in social science from the State University of New York at Stonybrook in 1971. He received a J.D. from the Boston College Law School in 1975. During the academic year 1975-1976 he was a teaching fellow at the University of Illinois College of Law. From around 1976 to 1981 he was an associate at the Chicago firm of Jenner & Block. From 1981 until 1987 he was an associate and from July of 1982 to 1987 a partner in the firm of Goldberg, Kohn, Bell, Black Rosenbloom & Ritz. Since the fall of 1987 he has been a sole practitioner. Mr. Messina is an experienced member of the bar who had reason to be familiar in his past work with orders of confidentiality, as well as the consequences of violating those orders.

Even if Mr. Messina's past general legal experience had not given him a firm understanding about protective orders and seals, his specific experience as leading counsel in the Grove Fresh litigation should have filled in that gap. Mr. Messina's understanding of the application of the order is relevant to a proper determination of its scope. Combs v. Ryan's Coal Co., Inc., 785 F.2d 970, 978 (11th Cir. 1986); Duracell Inc. v. Global Imports, Inc., 660 F. Supp. 690, 692 (S.D. N.Y. 1987).

In both Grove Fresh suits, Mr. Messina was warned time and again about his conduct. His repeated attempts to circumvent my orders prompted me to observe on 3 May 1991 that it was apparently Mr. Messina's intention to beat one of the defendants in this case "over the head in public with what [he] believe[d] to be wrongdoing." Any proper interpretation and application of the orders requires that they be viewed in connection not only with Mr. Messina's attorney status, but with his past violations and the warnings he experienced during the course of the Grove Fresh litigation.[11/]

Moreover, given the orders' context, audience, and nature, Mr. Messina's interpretation of them is unreasonable. The prohibition of an order must be subject to reasonable interpretation, and, while a court cannot expand the terms of the order, it may look to the nature of the original proceedings to interpret and apply it. United States v. Greyhound Corp., 508 F.2d 529, 532, 537 (7th Cir. 1974). Courts are not and should not be compelled to accept "twisted interpretations" or "tortured constructions" of an order. Id. at 532. Furthermore, a court order is issued to be obeyed. In effectuating this purpose, a court should not interpret the order in such a way as to render it a nullity. Id. at 533. Rather an order should be interpreted to give effect to its purpose and spirit. See Chase Industries, Inc. v. Frommelt Industries, Inc., 806 F. Supp. 1381, 1386 (N.D. Iowa 1992). Mr. Messina's

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11/ Mr. Messina repeatedly filed or attempted to file in a public manner documents that were confidential under the orders of confidentiality. See, e.g., Everfresh's Emergency Motion to Require Grove Fresh to File Its Motion and Reply Under Seal (filed 3 October 1990); Motion to Enforce Prior Orders of Court of Labatt and Everfresh/Canada (filed 1 May 1991); Everfresh's Motion (A) to Enforce This Court's Previous Orders; (B) To Strike and Seal Grove Fresh's Latest Pleadings; and (C) For Sanctions (filed 1 May 1991, and which contains a lengthy list of public filings contrary to explicit orders); Motion to Strike Memorandum Filed by Grove Fresh on January 15, 1993 (filed 20 January 1992, and which resulted in the Memorandum being withdrawn from the Court file by Mr. Messina's co-counsel); Petition of American Citrus Products Corporation and Henry Lang for a Rule to Show Cause Why John P. Messina should Not Be Held in Contempt for a Violation of This Court's Sealing Order (filed 3 November 1993).

construction of the orders is tortured.[12/] He interprets the seal as doing nothing more than regulating the public's access to the physical items on file at the clerk's office. Such an interpretation would render the sealing order a nullity by allowing the public to have the words, ideas, and facts contained in protected materials, while denying them access only to the documents which contained them. The purpose of the order is not fulfilled and the conduct at which it is aimed is not curtailed if Mr. Messina's interpretation is accepted.

Moreover, Mr. Messina's interpretation is twisted. By arguing that anything not expressly prohibited by the orders may be revealed, Mr. Messina engages in the fallacy of omission: he claims that he could reveal whatever information he wanted as long as the order on its face did not expressly prohibit it; that anything omitted was allowed. This not only defies common sense, but basically denies any prophylactic effect to orders intentionally written to be broad.

The sealing order, when viewed in conjunction with the protective order, must reasonably be viewed as protecting not just documents, but the contents of those documents. The orders, after all, were intended to protect the defendants against a resolution of this case prompted by Mr. Messina's unauthorized disclosures. That interest would not be served by an interpretation and application of the orders which permitted Mr. Messina to publicly disclose any information he deemed appropriate, but restrained only his distribution of the documents containing that information.

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12/ To listen to Mr. Messina on the scope of the orders is to hear a veritable potpourri of tortured constructions. An example: in the course of a deposition taken 29 August 1991, Mr. Messina stated that he understood the sealing order to protect disclosure obtained during discovery: "[U]ntil we reach an agreement or agree to disagree, the depositions [including this one] are being treated as though they are protected by the seal." Later, in his own deposition, Mr. Messina interpreted the phrase "as though" as meaning "we're going to pretend that it's protected by the seal."

The game of "let's-pretend-the-deposition-was-protected-under-seal-when-it-really-isn't" is typical of Mr. Messina's methods. Not only is it unfair to the other players -- i.e., Mr. Messina's opposing counsel -- who interpret words less fancifully, but it exacerbates an insidious public stereotype of lawyers as untrustworthy manipulators of language.

If Mr. Messina had any doubts about exactly what he could or could not disclose, he had the continued opportunity to seek clarification. When a defendant undertakes his own interpretation of an order, and does not seek clarification, then he proceeds at his peril. Failure to seek clarification of an order, "combined with actions based upon a twisted or implausible interpretation of the order will be strong evidence of a willful violation of the decree." Greyhound, 508 F.2d at 532. See Donovan v. Sureway Cleaners, 656 F.2d 1368, 1373 (9th Cir. 1981). It follows that if one seeks clarification, gets it, and subsequently disregards it, the evidence of a willful violation is even stronger.

Mr. Messina sought clarification of the orders, and on 8 April 1994 I provided it, along with a specific procedure to be followed before any future disclosures were made: Mr. Messina was to present me with a petition setting out the information he sought to disclose, along with its independent public source.[13] In spite of my admonitions, and Mr. Messina's self-professed confusion,[14] he never once attempted to follow the required procedure or even consult me in a more informal manner.[15] I offered Mr. Messina unlimited opportunities to clarify the

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[13] That Mr. Messina knew and understood the procedure I had outlined is evident from his testimony: "[I]f I needed or wanted to consult with prospective clients . . . what I should do is come in with a petition setting forth what it was I wanted to communicate and to identify, in the court's words, chapter and verse the public sources."

[14] Mr. Messina admitted in Court that there were times when he was "confused" about whether the seal order was intended to apply to depositions and other discovery, but this confusion evidently did not prompt him to seek further clarification. Mr. Messina claims that for the "last year or so of the case I had come to the conclusion that the – the proper or the accurate construction of the sealing order was that it did not apply to discovery. . . ." Given that this conclusion was made in a judicial void, its basis is dubious.

[15] When asked whether he ever used that procedure during his hearing, Messina admitted he had not: "I thought about using it, and the more I thought about what would have to go into the petition, the more I thought I would only be inviting more problems rather than solving a problem." My feeling is that the problem Mr. Messina most feared he would invite by consulting me was that I would interpret the orders in ways with which he disagreed.

orders' scope as they related to specific disclosures but he chose not to avail himself of these.

Even if Mr. Messina's arguments were credible, I find that Mr. Messina's belief in them at the time is not. Since his interpretations of the orders are both unreasonable and unbelievable, and the result of a voluntarily-enforced ignorance, Mr. Messina is estopped from using them as a defense.

2. Constitutionality

Mr. Messina also attempts to defend his disclosures from a finding of contempt by arguing that the orders of confidentiality unduly restricted his right to free speech under the First Amendment. But even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, the Supreme Court has observed that freedom of speech "does not comprehend the right to speak on any subject at any time." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984) (citation omitted).

In Seattle Times -- the most thorough exploration yet by the Supreme Court on orders of confidentiality -- it was held that when a protective order is entered on a showing of "good cause" as required by Federal Rule of Civil Procedure 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of information if gained from other sources, it does not offend the First Amendment. Id. at 37. While the context of the case was somewhat limited, the decision's reasoning strongly suggests that Mr. Messina's First Amendment defense cannot succeed. It is necessary to parse the holding to see why.

Although the Seattle Times Court focused exclusively on protective orders issued under Rule 26,[16] it recognized that courts

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[16] Rule 26(c) allows for protective orders "on matters relating to a deposition." This has been interpreted more broadly to allow protective orders for all types of discovery materials. See Seattle Times, 467 U.S. at 34-37.

Under Local Rule 18(A), "discovery materials" includes "all interrogatories, requests for production and inspection, requests for admission,

"have inherent equitable power to grant confidentiality orders, whether or not such orders are specifically authorized by procedural rules." Id. at 35. How broad these equitable powers are is a matter left unexplored by Seattle Times, but, since discovery is the focus of both Rule 26 and Seattle Times, there is nothing in the opinion to suggest that those equitable powers are likewise limited to protecting discovery materials. Indeed, the reverse appears to be true.

One important reason, the Court said, why "the trial court[s] have substantial latitude to fashion protective orders is the "unique character of the discovery process." Id. at 36. An order "prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny" because discovery materials such as pretrial depositions and interrogatories are not considered "public components of a civil trial." Id. at 32-33.

But the Court did not go as far as to suggest that protective orders which cover a broader variety of materials than those pertaining to discovery are constitutionally infirm. This is especially true for those materials to which access could only be gained by parties to the litigation, since there is "no First Amendment right of access to information made available only for purposes of trying his suit." Id. at 32. Like discovery materials, the dissemination of agreements intended by the parties to be confidential carries a "significant potential for abuse" which could "implicate privacy interests of litigants and third parties." Id. at 34. The Court found that such rights and interests were "implicit in the broad purpose and language of the rule." Id. at 35 n.21.

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and responses and objections made pursuant to [specified] Federal Rules of Civil Procedure, and notices of depositions issued and depositions taken pursuant [to other specified Federal Rules].

The Seattle Times holding was specifically limited to those protective orders entered for "good cause" as required under Rule 26(c). Id. at 37. Whether "good cause" under Rule 26 is to be interpreted differently from whatever the necessary predicate is protective orders issued on another basis need not be decided here, since I believe the orders at issue here satisfy the Rule 26 "good cause" standard. See infra part A.3.

The goal of protecting the litigants' privacy interests from abuse is as valid in the context of confidential agreements as it is for discovery. Thus, confidential agreements filed during the course of a lawsuit in reliance on an existing seal -- such as confidential settlement agreements -- are also worthy subjects for a protective order, because, like discovery material, they too cannot really be considered "public components of a civil trial." See id. at 33. See also City of Hartford v. Chase, 942 F.2d 130, 135-36 (2d Cir. 1991) (upholding district court's power to prevent access to all documents related to settlement).

And while there is "simply no legitimate public interest" to be served by disclosing settlement agreements, the parties to the agreement are likely to have "a compelling interest in keeping the settlement amount confidential." Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 486-87 (1991). In fact, confidential settlement agreements are likely in the long run to best serve the interests of the public and the parties alike: "[W]hatever the value of disclosure, it should not obscure the strong public interest in, and policy objectives furthered by, promoting settlement." Id. at 486. Thus, "absent special circumstances, a court should honor confidentialities that are bargained-for elements of settlement agreements."[17] Id.

The orders of confidentiality at issue here were not explicitly issued under Rule 26, but there is, and was meant to be, some overlap with Rule 26's protection of discovery materials (an express purpose behind the orders was "to facilitate discovery"). But the scope of my protective orders was meant and understood by Mr. Messina to be

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[17] As Professor Miller has observed, "[a] number of courts have required a common law right of access when there has been judicial participation in the settlement process, but they have given it extremely different application." Id. at n.290. Compare Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 206 (Minn. 1986) (emphasizing the traditional privacy of settlements and the policy favoring settlements) with Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d Cir. 1986) (stating that court approval of a settlement is something the public has a right to know about and evaluate).

broader than the scope of a Rule 26 protective order,[18] covering not only discovery materials, but also other documents considered confidential, including confidential settlement agreements. Orders of such scope are within the trial court's discretion. See Chase, 942 F.2d at 135-36.

But for his status as Plaintiff's attorney, Mr. Messina would never have had access to the confidential settlement agreement whose terms he disclosed. He cannot shield the abuse of his insider's knowledge of the settlement amount by references to the Constitution, since orders restricting disclosure of information gained, such as here, purely from inside access to the documents implicate constitutional rights "to a far lesser extent than would restraints on dissemination of information in a different context." Id. at 33-34.

Mr. Messina also claims he cannot be punished for disclosing information independently available from a public source. Prohibiting the disclosure of information "gained through means independent of the court's processes" would raise the specter of prior restraint. Id. at 34. Putting aside the obvious problem of attempting to restrict information presumptively protected by the First Amendment, there are two commonsense policy reasons for not punishing someone from divulging information identical to that contained in a public source. One, it would be inherently unfair; and two, it would be too difficult, when considering sanctions for disclosure, to determine which source -- public or protected -- was used.

Finding Mr. Messina in contempt in this case for revealing information to which the general public had access would be both unfair and unconstitutional. But my orders certainly cannot be seen as an attempt to prevent the dissemination of public information. Aside from the implicit restraints of the First Amendment on the orders (as per Seattle Times), I explicitly exempted the dissemination of publicly available information from the orders' reach in clarifying for Mr. Messina the orders' scope.

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[18] As I stated on 27 October, "[o]ne of the reasons that the sealing order was so broad was my concern that Mr. Messina would ignore any order that was not broad."

However, since it was by no means self-evident exactly which information was or was not independently available from a public source,[19] I required, as part of the procedure Mr. Messina was to follow prior to making further disclosures, that he identify to this court his allegedly independent public source. Putting this burden on Mr. Messina was reasonable,[20] since -- unlike his opposing counsel or the court itself -- Mr. Messina was in the best position quickly to articulate the nature and location of his public source. Any restraints this procedure might have imposed on Mr. Messina's First Amendment rights were de minimis and ephemeral, and were substantially outweighed not only by the more compelling interests of the parties seeking confidentiality, but also by the interests of justice and judicial economy.[21]

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[19] Nor necessarily evident to Mr. Messina. As he himself testified, "[O]nce the case was filed . . . there was an awful lot of discovery that was redundant with information that I had gotten from public sources. But there was also discovery that provided additional information on subjects that I had gotten from public sources."

[20] This burden is not to be confused with the threshold burden of persuasion placed on the designating party to show "good cause" for a protective order under Rule 26(c). Leucadia, Inc. v. Allied Extrusion Technologies, Inc., 998 F.2d 157, 166 (3d Cir. 1993); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) ("Rule 26(c) places the burden of persuasion on the party seeking the protective order. To overcome the presumption, the party seeking the protective order must show good cause. . . ."), cert. denied, 484 U.S. 976 (1987).

Nor is it to be confused with the burden, also borne by the designating party after a challenge to the designation, of proving that the information was appropriately subject to the confidentiality and sealing provisions in the order." Id. at 158-59. These burdens had already been surmounted to my satisfaction. Therefore this is not a Leucadia situation, where the district court had improperly placed the burden of persuasion on the party seeking access to sealed judicial records, rather than on the designating party, to justify continued secrecy. See Leucadia, 998 F.2d at 166-67.

[21] Messina argues that the outlined procedure unconstitutionally conditioned his "fundamental right to practice law." Since the practice of a [sic] law in the United States is a privilege, not a fundamental right, I do not address this argument.

Mr. Messina voluntarily chose not to avail himself of a procedure personally tailored to meet his needs and protect his rights. Consequently he did not identify to me any independent public sources prior to making his disclosures. Having failed to meet his burden, he is therefore estopped from raising as a defense the alternate availability of a public source.[22/]

Moreover, even if Mr. Messina is correct, and some of the information he disclosed was publicly available, this will not necessarily shield him from revealing things which were not. For each of the alleged instances of contempt adequate and independent grounds exist for sanctioning Mr. Messina solely for those disclosures made without a separate public source. Specifically, disclosures concerning (1) the invocation of the Fifth Amendment privilege by certain individuals and (2) the amount of the settlement.[23/] Neither piece of information, despite Mr. Messina's insistent and unsupported claims to the contrary, was independently available from a public source.

Because Mr. Messina could "disseminate the identical information covered by the protective order as long as the information [was] gained through means independent of the court's processes," Seattle Times, 467 U.S. at 32-33, there was no prior restraint. Mr. Messina's unauthorized disclosures of protected information not gained by independent means are therefore constitutionally valid grounds for contempt.

3. Validity

If the order underlying it is invalid, a contempt judgment based on a violation of that order may well fall with it. Marrese v. American Academy Orthopaedic Surgeons, 726 F.2d 1150, 1157 (7th Cir. 1984), rev'd on other grounds, 470 U.S. 373 (1985). Seeking to take advantage of this rule, Mr. Messina questions the underlying validity of the seal and the protective order as a way of preemptively

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22/ This is especially true for those instances where Mr. Messina claims as "public" information he himself disclosed to the public. See infra part B.2.

23/ These disclosures are more fully examined infra part B.

neutralizing any determinations of contempt.[24/] Even assuming that Mr. Messina was permitted to raise the validity of the contempt order as a defense during his hearing rather than having to wait to do so on appeal, see United States v. Pearce, 792 F.2d 397, 400 (3d Cir. 1986), this defense still cannot succeed for the simple reason that the orders

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24/ Assuming for the sake of argument that my orders were invalid, Mr. Messina's reliance on Marrese to exonerate him from a judgment of contempt for their violation is problematic. This is not only because there is no single majority opinion of the en banc court, nor even because the case focused exclusively on criminal, rather than civil, contempt. My reservations about the efficacy of Marrese as it relates to Mr. Messina's defense are rooted in more fundamental concerns.

First, because as Judge Posner's opinion notes, there are many decisions which hold that a contempt citation remains intact even after invalidation of the underlying order which was violated. Marrese, 726 F.2d at 1157. See also Howat v. Kansas, 258 U.S. 181, 189-90 (1922); United States v. Mine Workers, 330 U.S. 258, 291-94 (1947); Maness v. Meyers, 419 U.S. 449, 458 (1975); Blocksom & Co. v. Marshall, 582 F.2d 1122, 1124 (7th Cir. 1978).

Moreover, a more recent ruling by this court, and, unlike Marrese, one specifically addressed to orders of confidentiality, held that a "confidentiality order is effective until modified" the collateral bar doctrine requires litigants to obey invalid orders while they are outstanding." Matter of Krynicki, 983 F.2d 74, 78 (7th Cir. 1992), citing Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 439-40 (1976). Even though Krynicki did not specifically refer to contempt, the enunciated rule would have no teeth if its violation could not be remedied through contempt sanctions. The unavoidable inference of Krynicki therefore is that Marrese does not include protective orders within its scope.

Second, Judge Posner attempted to reconcile the apparent contradiction in the lines of precedent by noting that in those cases where the validity of the underlying order was held not to be reviewable on appeal from the judgment of contempt, the order could have been appealed as of right directly, or otherwise reviewed other than by appeal from the contempt judgment. Marrese, 726 F.2d at 1157. Discovery orders, like the one at issue in Marrese, are not appealable. Id. But not only are orders of confidentiality appealable independent of any contempt judgment, the orders in this very case were actually appealed to the Seventh Circuit. See Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d, 898-99 (7th Cir. 1994). Thus, the orders at issue here fall outside the Marrese rule, and even a finding that the underlying order was invalid would not shield Mr. Messina from being found in contempt for its violation. See Maness, 410 U.S. at 458 ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.").

of confidentiality are, and were, valid. And "a continuing respect for the valid decrees of a court commands that they be obeyed until changed." Kindred v. Duckworth, 9 F.3d 638, 644 (7th Cir. 1993), citing Pasadena Bd. Educ. v. Spangler, 427 U.S. 424, 439-40 (1976).

A district court must independently determine if "good cause" exists before issuing a stipulated protective order. Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.2d 854, 858 (7th Cir. 1994); Leucadia, Inc. v. Allied Extrusion Technologies, Inc., 998 F.2d 157, 166 (3d Cir. 1993) ("To overcome the presumption [of public access], the court may construct a broad 'umbrella' protective order upon a threshold showing by one party (the movant) of good cause.") (citation and internal quotation marks omitted). In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process.[25/] Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994), citing Miller, Confidentiality, 105 Harv. L. Rev. at 432-33. When a district court carefully considers "each of the factors which favor[] access or continued secrecy for the documents at issue" and assigns "appropriate weights to the various interests," there is no abuse of discretion. Leucadia, 998 F.2d at 167, citing Littlejohn v. Bic Corp., 851 F.2d 673, 685 (3d Cir. 1988).

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[25/] The Third Circuit recently has summarized a non-exhaustive list of factors to be considered in the balancing process. These include (1) whether parties have an interest in privacy; (2) whether information is being sought for a legitimate purpose or for improper purpose; (3) whether there is a threat of serious embarrassment to a party; (4) whether information is important to public health and safety; (5) whether sharing of information among litigants would promote fairness and efficiency; (6) whether a party benefiting from the confidentiality order is a public entity or official; and (7) whether the case involves issues important to the public. Pansy, 23 F.3d at 787-88. As the record in the instant case shows, I felt that any presumptive right of access possibly merited by (4) was substantially outweighed by (1), (2), and, to some extent, (3). Although information concerning public health and safety was implicated -- this being a case involving the adulteration of orange juice -- I was not convinced by the evidence before me at that time that (4) merited greater weight. Factor (7) overlapped with (4), and the two were considered together. Factors (5) and (6) were not relevant in this case, and were therefore not considered in my balancing of the interests.

In deciding to seal a case, a district court should articulate the findings and reasoning that served as a basis for the seal. Grove Fresh Distributors, Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994). But, since an absence of those findings and reasoning in the record is not necessarily evidence that a court never considered good cause, the real question is whether or not there was any substantive decision behind the record's "silence."

If the lack of articulated findings stems from a complete failure to make a good cause determination, the order is likely to be found invalid. See Jepson, 30 F.3d 859. The consequence of that would be the reversal of any sanctions imposed for violating the order now adjudged to be invalid. See id. In Jepson, the Seventh Circuit reversed the district court's imposition of sanctions against counsel for disclosing information subject to a stipulated protective order because it determined that the underlying order was invalid. Id. at 858-60. The Court was not only disturbed by the lack of any implicit or explicit reference to "good cause" in the order itself, but also by the fact that no specific finding of this appeared anywhere in the record. Id. at 859.

Reversal in Jepson was appropriate because there was "no indication that the magistrate judge made some independent determination that 'good cause' existed before issuing its [protective order]. Id. at 858-59 (emphasis added). But while the rationale for sealing cases should ideally be put on the record at the time of the sealing, the Seventh Circuit has "yet to hold that where such a description is [initially] lacking, reversal is per se appropriate." Grove Fresh, 24 F.3d at 898.

The Court of Appeals will independently determine if good cause existed only if the lower court obviously did not. See Jepson, 30 F.3d at 859. See also Leucadia, 988 F.2d at 167 ("The required balancing should be done in the first instance by the district court"). In this circuit, the preferred method to see whether good cause was determined (if not recorded) is to remand the matter back to the authorizing court. See Grove Fresh, 24 F.3d at 898. If on remand the district court can specify the basis for its sealing order, the order cannot be invalidated -- and the sanctions for violating the order reversed -- for a complete failure to decide good cause. See Jepson, 30 F.3d at

860. Moreover, the Court of Appeals will then have findings specific enough to "determine whether the closure order was properly entered." Grove Fresh, 24 F.3d at 898, quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1985).

The court in Jepson was dealing with a stipulated protective order that was never submitted to the district court, never signed by it, and never entered. Id. at 856-57. How much weight this played in the Seventh Circuit's reasoning is unclear,[26] but from the opinion this fact was considered. See id. at 856. Here, of course, the stipulated protective order at issue was submitted to me, I did sign it, and it was entered. And although I never actually used the phrase "good cause" to justify my reasons for signing it, the record amply attests to an independent determination of good cause, including a balancing of interests, which justified the seal as well as the protective order.[27]

Given the purpose for the orders, the context in which they were issued, and the balancing of the respective interests, the orders are valid: there was good cause to find good cause. However, even assuming that the orders were invalid, Mr. Messina may still be punished for violating them. Krynicki, 983 F.2d at 439-40 (holding litigants must obey even invalid outstanding orders of confidentiality). Any alleged invalidity of the underlying orders would not affect the validity of a contempt judgment for their violation.

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[26] Unclear partly because there were two protective orders at issue in the case: a stipulated protective order that the district court never saw and an interim protective order that was signed by the magistrate judge without considering good cause. See Jepson, Inc., 30 F.3d at 856. Judge Kanne's analysis does not always distinguish between the two. See id. at 859. Perhaps this is because the orders overlapped to a certain extent, id. at 856, and perhaps because the attorney was sanctioned pursuant to a Motion for Enforcement of Protective Orders [plural] and for Sanctions. Id. at 857 (emphasis added). As both orders were involved, and as their purposes overlapped, the Court may have felt it expedient to treat them for purposes of analysis as interchangeable.

[27] Ironically, I elaborated on my reasons for issuing the orders one month prior to the Seventh Circuit's request that I "specify the basis" for the seal.

B. Violations of the Orders of Confidentiality

1. Disclosures in Appellate Brief

The first charge of contempt against Mr. Messina stems from a forty-two page brief he filed with the Seventh Circuit Court of Appeals on 22 October 1993.[2/] Within the brief, defendants American Citrus and John Labatt allege Mr. Messina disclosed protected information that was not available from public sources and which could only have come from the discovery process in the case.

Specifically, Messina is charged with having asserted that certain defendants, or representatives of defendants, invoked the Fifth Amendment privilege against self incrimination. Moreover, it is alleged that Messina mischaracterized the record by asserting that other individuals had invoked the Fifth Amendment (and stating that adverse inferences should thereby be drawn against the corporate defendants) when in fact they had not, thus making Messina's disclosures to the Seventh Circuit deceptive as well as improper.

A perusal of the brief in question shows the above charges to be true: the disclosures about the Fifth Amendment were made, the disclosures were improper because the disseminated information was protected by both the seal and the protective order, the information was unavailable from any independent public source, and inaccuracies in that which was divulged distorted the record. Mr. Messina's revelations are all the more egregious for having been made with full knowledge -- as he admitted under cross-examination -- that at the time he made his disclosures I then had before me a motion in support of keeping under seal the very issues he disclosed.

The orders in this case were entered lawfully and were reasonably specific. Mr. Messina violated those orders, and the

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[2/] At the time of filing, Mr. Messina was neither a party, nor an attorney for any party, in the Grove Fresh litigation. The Seventh Circuit struck the motion as frivolous, and asked him to show cause why he should not be sanctioned for improper conduct. Sanctions against Mr. Messina for mischaracterizing his attorney status and his standing are discussed infra part D.

violation of those orders was willful. There are not valid defenses to his actions. The evidence of Mr. Messina's violation of the orders here is more than clear and convincing, it is beyond a reasonable doubt. Since the elements and the standard of criminal contempt are met, and since what will satisfy the stricter criminal contempt standards will necessarily satisfy its civil counterpart, the same acts by Mr. Messina may yield sanctions for both criminal and civil contempt.

For this first instance of civil contempt, I order Mr. Messina to compensate the parties for losses they can prove resulted from noncompliance, including attorney's fees and costs incurred in preparing and prosecuting Mr. Messina for contempt (this may include overhead and support personnel). The defendants shall submit for review the total amount of this compensation within two weeks from the date of this opinion.

And for this first instance of Mr. Messina's criminal contempt, which not only subverted the authority of the court, but also wasted its time (and therefore the taxpayers money), I fine him $1000. This amount, which is meant to compensate the government as well as to punish Mr. Messina's disobedience, is due within three days after the issuance of this opinion, and shall be paid by certified check made out to "the United States of America."

2. Disclosure in Letter

The second contempt charge against Mr. Messina stems from a letter, dated 20 September 1994, written by Mr. Messina to John Elson, of the Northwestern University Legal Clinic, counsel for the Ad Hoc Coalition of In Depth Journalists, an intervenor. In this letter, defendants claim, Mr. Messina disclosed -- and substantially mischaracterized -- information obtained from discovery, and quoted verbatim from the sealed complaint.

Instead of consulting with me, as he was advised to do before making further disclosures, Mr. Messina -- perhaps attempting to save this court the time and trouble of deciding the matter for itself -- decided the legal issues on his own. Thus he begins his letter by unequivocally stating that the designations about materials to remain

under seal are "not well grounded in fact," and that "[a]fter careful review of the applicable law and the procedural history of the seal in the Labatt case, I have concluded that I am free to provide you with [the] information . . . set out below." And provide it he did.

At page 4, arguing that the settlement terms were no longer confidential and therefore did not justify closing the post-settlement proceedings, Mr. Messina disclosed the confidential settlement amount, which was part of the sealed record.[29/] In doing so, he violated not only the orders of confidentiality, but also prejudiced the interests of his client by knowingly and willfully violating the terms of the confidential settlement agreement itself.[30/]

At pages 6 through 8, arguing that American Citrus' objection to certain designations were groundless,[31/] Mr. Messina revealed potentially disparaging and scandalous designations contained in the sealed complaint. Messina admitted under cross-examination that at the time he disclosed this information he knew that keeping those particular designations under seal was then an issue before me awaiting decision..

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29/ These disclosures were justified, Mr. Messina argues, because this information was "public." But he eventually (and reluctantly) admitted under cross-examination that the information was public only because of disclosures he made in his motion to the Seventh Circuit: "The information about the settlement amount [as published in national press] certainly came from my papers."

Thus, Mr. Messina attempts to defend his actions by claiming as "public" protected information he himself disseminated to the public. The circularity of his argument is audacious, even by his own standards of audacity.

30/ Under cross-examination Mr. Messina admitted he understood that the settlement agreement between the defendants and Grove Fresh contained confidentiality provisions, that one of the terms that was to remain confidential was the amount of the settlement, and that the amount was defined as one of the material terms to remain confidential. He also admitted he knew that the defendants did not want the information disclosed, that confidentiality is valuable, and that he understood the value of confidentiality in an agreement.

31/ These designations, which plausibly had negative connotations, referred to the adulterated orange juice formula and the organization which utilized it.

Also at page 6, Mr. Messina revealed that certain individuals had invoked the Fifth Amendment privilege against self-incrimination. This information was exclusively contained in discovery materials covered by the seal and the protective order.[32/]

At page 7 of his letter Messina quoted paragraphs 99, 100, and 102 of the complaint, which was then under seal. The quotes were verbatim.

At page 8, arguing that American Citrus' objection to the naming of non-party co-conspirators was groundless, Messina disclosed the identity of eight individuals named in the sealed complaint who he alleged were co-conspirators. He did this even though, as he admitted under cross-examination, he knew that the identification of these individuals -- and the issue of whether this information should be made public -- was the subject of a brief before me, for which the parties were presently awaiting a judgment.

Again, I find that Mr. Messina willfully violated reasonably specific orders beyond a reasonable doubt. Again, there are no valid defenses to Mr. Messina's action. Again, both civil and criminal contempt sanctions are appropriate. These sanctions, for this second instance of contempt, are identical to those previously cited: compensation for the parties' losses and a fine exacted on behalf of the United States.

3. Disclosure in Conversation

The third alleged instance of contempt springs from Mr. Messina's disclosure of protected information to a reporter for a national publication, resulting in a front page story revealing the contents of his disclosures. See Diana B. Henriquez, 10% of Fruit

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[32/] Mr. Messina tries to claim that this information was unrelated to discovery, since it was supposedly information contained in a letter from one of the defendant's attorneys. But after much waffling, he finally admitted under cross-examination that the letter was only written in response to a deposition notice issued by Grove Fresh. Such a response was unquestionably related to discovery.

Juice Sold in U.S. Is Not All Juice, Regulators Say, N.Y. Times, Oct. 31, 1993, at A1.

Messina admitted in deposition that he had a private conversation with Diana Henriquez, the article's author, in which he divulged that certain named individuals had invoked the Fifth Amendment privilege. At the time he made his disclosures, that information was exclusively available from nonpublic, protected discovery materials. Moreover, Mr. Messina testified that he directed Ms. Henriquez to his recently filed Seventh Circuit brief, where the newly "public" information about the settlement amount was immediately discoverable. This amount appeared in the story. Id. at A11.

Once again, I find that Mr. Messina willfully violated reasonably specific orders beyond a reasonable doubt; that no valid defenses exist to his actions; and that both civil and criminal contempt sanctions are appropriate. The sanctions for this third instance of contempt are identical to, but separate from, those mentioned previously.

4. Future Disclosures

Two recent instances of Mr. Messina's behavior make me question whether Mr. Messina has the necessary self restraint to curb his seemingly uncontrollable propensity to disclose protected materials. The first concerns a "press release" which Mr. Messina drafted, sent to the defendants on 24 January 1995, and threatened to disseminate on 27 January 1995. Headlined "Orange Juice Companies Seek to Punish Lawyer Who Uncovered Consumer Fraud," this "press release" disclosed the invocations of the Fifth Amendment privilege, as well as substantial (and often inaccurate) information about the settlement negotiations, including disclosures of communications with the Court, and with Mr. Messina's former client and co-counsel.

Whether Mr. Messina's methods are seen as tough negotiation or blackmail, his bad faith is evidenced by his threat to send his "press release" not only to the press, but to the Plaintiff's Bar as well. (Although he denied this particular audience was chosen to raise the

specter of additional lawsuits against the defendants, he was unconvincing.) Mr. Messina evidently had no compunctions about coercing compliance with his demands by threatening the disclosure of protected information. And there is no question that he would have followed through with his threat: under cross-examination, Mr. Messina admitted that, absent compliance or a court order, "the press release would have been issued."

As disturbing as is Mr. Messina's willingness to hurt his perceived enemies, it pales beside his willingness to run roughshod over the best interests of his client. This incident prompted the sad spectacle of Mr. Messina's former client, Grove Fresh, filing a motion to preclude him from filing his "press release." Perhaps Mr. Messina felt no loyalty to Grove Fresh since he had been "relieved" of his assignment, but no client -- present or former -- should be treated the way Mr. Messina treated Grove Fresh. Had he been class counsel, I would have afforded him no fees, because he was seemingly incapable of placing his client's interests above his own.

The second recent incident which makes me question Mr. Messina's ability to restrain himself from future violations concerns his recent spate of filings -- nine documents filed between 9 March and 27 April 1995 -- with the Seventh Circuit. Seemingly impervious to the fact that among the questions currently before this court (indeed the subject of part of this opinion) are Mr. Messina's previous disclosures in an appellate brief of the confidential settlement amount, Mr. Messina, in his latest publicly-filed Seventh Circuit briefs, once again blithely discloses the confidential settlement amount. See, e.g., John Messina's Motion to Consolidate Appeals and Briefing Schedules at 3 (filed 24 April 1995).

These latest happenings prompt more than a sense of déjà vu. Such a shamelessly willful subversion of this court's authority and business, performed with such reckless abandon, engenders the two feelings which Aristotle believed created the catharsis which accompanied great tragedy: fear and pity. See Poetics at 230. Fear that Mr. Messina will continue to disregard this court's express orders, and pity that in doing so he teeters so precariously on the abyss.

To save Grove Fresh defendants from a significant risk of repetition of future disclosures (which from the evidence is clear and convincing), and perhaps to save Mr. Messina from himself, I require Mr. Messina to post a $50,000 bond for the next five years. Perhaps the forfeiture of this amount for future violations will give Mr. Messina something his tragic cousin Hamlet had in abundance: pause.

C. Failure to Appear

The fourth contempt charge against Mr. Messina stems from his failure to show up in court, as ordered, on 21 October 1993. The circumstances behind the nonappearance are as follows:

On 20 August 1993, Everfresh filed a Motion to Enforce Settlement Or Relief From Judgment. When the motion was initially called, Mr. Messina did not appear. The Court ordered that either Mr. Messina or his legal representative appear in response to the motion when next heard, which was set to be 1 September 1993. As he acknowledged in both his deposition and hearing testimony, Mr. Messina was expressly advised of this order.

The matter was then put over at the request of Mr. Messina's lawyer. By letter dated October 5, 1993, Mr. Messina was informed that the Court would not be in session until 18 October 1993, but that the Everfresh motion would be called shortly thereafter. This was the same motion for which Mr. Messina had earlier failed to appear, and for which the court had ordered his appearance.

On 12 October 1994, Mr. Messina received formal notice that the Everfresh motion had been re-noticed to be heard on 21 October 1993. Mr. Messina admitted in court it was served on him and that he knew the renoticed motion was the same as that for which he was ordered to appear on 1 September 1993.

On the evening of 20 October, Mr. Messina decided he would not appear as ordered. Shortly after 6 a.m. on the morning of 21 October Mr. Messina faxed a letter to counsel for defendants "as a courtesy to let you know that I do not plan to attend the hearing which you have noticed [today]." (A similar courtesy was not

extended to the court, which was given no advance notice of his planned absence.) In response, Mr. Messina received a letter reminding him of his obligation to appear as ordered. Although again put on notice that his appearance was required, Mr. Messina failed to show up.

An order requiring a court appearance will flunk the "reasonable specificity" requirement for a contempt finding if the language of the order leaves any doubt or uncertainty that an appearance is required. See Matter of Betts, 927 F.2d 983, 987 (7th Cir. 1991). If a court order is ambiguous, it precludes the essential finding in a criminal contempt proceeding of willfulness. Id. In Betts, the criminal contempt conviction was reversed because the docket order did not state that an appearance was "de riguer." Id. at 988.

Mr. Messina's excuses for his nonappearance are many and varied.[33/] Given the evidence, few of them are plausible, many are disingenuous, and several are flatly contradicted by the chronology. None of them provides Mr. Messina with any real defense. After watching him testify, and after reviewing the record, I am convinced beyond any doubt that Mr. Messina had proper notice, fully understood his appearance was required, and knew the reasonable consequences of his actions.

I find not only that Mr. Messina's choice not to appear was willful, but that it was made in bad faith. The evidence convincingly

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[33/] His first excuse is that because he never actually received an order signed by the judge requiring him to appear, he was not obliged to attend. (This conclusion was based on his status as "an attorney with about 17 years of experience at the Bar.") Mr. Messina's second excuse is that he discovered at the eleventh hour that his attorney could not appear on his behalf, and he did not think it "wise to appear without counsel." Excuses three and four are found in his letter of 21 October 1993, sent the day he was due to appear. The third excuse is that the court did not have jurisdiction over him. The fourth is that the motion was not well-grounded in fact, and therefore he [sic] not to appear in what he assumed was a voluntary mediation process. The fifth is that the bare bones 60(b) motion did not make "a serious effort to plead fraud," and, since the court would only be involved as a mediator, he "respectfully decline[d] to participate voluntarily in any mediation process."

suggests Mr. Messina's nonappearance was motivated by a desire to prevent an order of this court: specifically, that he avoided the hearing so this court could not stop him from filing in the Seventh Circuit a brief on which he had been working for several weeks. On the day he was scheduled to appear, Mr. Messina instead had his affidavit for the brief notarized. On the following day, he filed the brief itself. I do not find the timing of all these events coincidental.

I find yet again that Mr. Messina willfully violated reasonably specific orders beyond a reasonable doubt; that no valid defenses exist to his actions; and that both civil and criminal contempt sanctions are appropriate. The sanctions for this instance of contempt is identical to, but separate from, those mentioned at the end of parts B.1-B.3: compensation to the defendants and a fine payable to "the United States of America."

D. Misrepresenting Attorney Status and Standing to Seventh Circuit

The fifth charge against Mr. Messina, which stems from the motion Messina filed with the Seventh Circuit Court of Appeals on 22 October 1993, potentially carries sanctions not for contempt but for violations of Rule 11 of the Federal Rules of Civil Procedure.[14] Defendants charge that Mr. Messina made material misrepresentations to the Court, fudging his status as an attorney in the Grove Fresh litigation in order to claim standing to make a personal motion.

The relevant chronology is as follows:

On 21 January 1993, the president of Grove Fresh wrote a letter to Mr. Messina informing him that he was "hereby relieved of all responsibility in the handling of this matter [the Grove Fresh

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[14] Rule 11 applies to "[e]very pleading, written motion, and other paper" signed by the attorney. Fed. R. Civ. P. 11(a) (emphasis added). Briefs submitted to the Courts of Appeals, as well as those filed in district court, come within the scope of Rule 11, since the term "other paper" in Rule 11 "includes notices of appeal and appellate briefs. . . ." Thornton v. Wahl, 787 F.2d 1151, 1153 (7th Cir. 1986), cert. denied, 479 U.S. 851 (1986). Thus, Rule 11 applies to the certifications made by Mr. Messina in his appellate brief.

litigation]. [Two other attorneys] will act as our sole attorneys and trial lawyers."

Then, on 22 October 1993, nine months after being discharged by his client, Mr. Messina filed a motion with the Seventh Circuit asking for a hearing to respond to allegations about him in defendants' brief. Mr. Messina didn't file any type of motion to intervene in the case or move for leave to file a motion regarding allegations of misconduct, but instead proceeded to file his motion on the theory that he had standing. In paragraph 1 of his motion in the Court of Appeals, Mr. Messina stated:

> Petitioner [Messina] is one of the attorney's of record for plaintiff, Grove Fresh Distributor's Inc.

Moreover, in both the motion itself and in the accompanying affidavit, Mr. Messina refers to himself as "the Grove Fresh attorney" or "Grove Fresh's attorney," and to Grove Fresh as "his client." Nowhere in either document did he mention being relieved of all responsibility for the Grove Fresh litigation.

On 28 October 1993, in response to a motion by Mr. Messina that was before me, Grove Fresh sought to distance itself from its former counsel's actions:

> Grove Fresh Distributer [sic], Inc. (Grove Fresh) did not authorize the filing of [Mr. Messina's motion]. Nor was the motion made on behalf of Grove Fresh. Mr. Messina was discharged as Grove Fresh's attorney on January 21, 1993. Although Mr. Messina has apparently not withdrawn his appearances in these cases, Mr. Messina has not been authorized to act on behalf of Grove Fresh since his discharge.

Even after Grove Fresh went on record disavowing a connection with him, Mr. Messina failed to either seek leave to withdraw as attorney of record or to amend his brief so that his stated attorney status more accurately conformed to his ex-client's conception of their relationship.

In an order dated 9 November 1993, the Seventh Circuit denied Messina's motion and granted motions by American Citrus, Labatt, and Everfresh to strike certain documents. The Court also asked Messina to show cause, pursuant to Federal Rule of Appellate Procedure 36(c), as to why he should not be sanctioned for filing a frivolous motion.

On 15 November 1993, American Citrus filed a motion in the Seventh Circuit for disciplinary action against Messina for misrepresenting his attorney status. The Court of Appeals, in an order dated 14 December 1993, denied this motion because "[t]he relief requested is appropriately sought in the district court."[35/]

Finally, on 21 January 1994, American Citrus and Labatt filed a joint memorandum in support of sanctions against Messina for, among other things, his misrepresentations to the Court of Appeals. The defendants pray for the court to impose appropriate monetary sanctions for Mr. Messina's misrepresentations.

Rule 11 requires that all pleadings and motions of a party represented by an attorney be signed by that attorney, certifying

> that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact . . . . warranted by existing law . . . [and] not interposed for any improper purpose. . . .

Fed. R. Civ. P. 11(b); Goka v. Bobbitt, 862 F.2d 646, 650 (7th Cir. 1988). It also provides that appropriate sanctions "shall be imposed if its provisions are violated." Goka v. Bobbitt, 862 F.2d at 650. The district courts are "best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990).

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[35/] The Court of Appeals may have wished only that I make the findings of fact which would have allowed it to sanction Mr. Messina on its own, under Fed. R. App. P. 38. If this is the case, the Court may, of course, vacate my disposition of the matter and substitute its own.

Mr. Messina violated Rule 11 in three ways, each of which would be independently sanctionable. First, because the recitation of his attorney status was not well grounded in fact. It would be reasonable, from Mr. Messina's representations in his brief and supporting affidavit, to infer that at the time of filing he was Grove Fresh's attorney in the Grove Fresh litigation. Reasonable, given what Mr. Messina says, but incorrect, given the material facts he omits.

Mr. Messina states in the first paragraph of the brief that he "is one of the attorney's [sic] of record for plaintiff, Grove Fresh Distributer's [sic], Inc." Local Rule 3.15 states that "[o]nce an attorney has filed an appearance form pursuant to General Rule 3.14 he/she is the attorney of record for the party represented for all purposes incident to the proceeding in which the appearance was filed." Moreover, "the attorney of record may not withdraw . . . without first obtaining leave of the court." Id. An attorney who does not request and obtain leave to withdraw is still considered the attorney of record. See Daniels v. Brennan, 887 F.2d 783, 784-85 (7th Cir. 1989). Thus, Mr. Messina's statement that he "is an attorney of record" is technically true.

But even if technically true, the placement of this statement (the first paragraph) and the use of the present tense ("is") implies a connection with both case and client that Mr. Messina no longer enjoyed. The misleading illusion that Mr. Messina was then currently representing Grove Fresh is perpetuated by Mr. Messina's numerous references -- in both the brief and his supporting affidavit -- to himself as "Grove Fresh's attorney" and Grove Fresh as "his client."

To make the illusion complete, Mr. Messina omits anything that might possibly contradict it. This silence is as misleading as anything that Mr. Messina says. Nowhere in the documents filed by Mr. Messina with the Seventh Circuit, including his forty-two page brief and thirteen page affidavit, does Mr. Messina mention the material fact that he was no longer Grove Fresh's attorney, was no longer working on the case, and had been discharged by Grove Fresh nine months earlier. Mr. Messina splits many linguistic hairs to exonerate himself, claiming that he did not consider himself to have been "discharged," merely "relieved of all responsibilities." Such distinctions are worse than implausible: they are insulting.

Mr. Messina claims he was simply trying to identify his relationship to the matter. But since he admitted he was acting on his own behalf, and filing on his own behalf, and the brief concerned not Grove Fresh but him personally, troubling questions arise: Why did he feel the need to describe his past relationship with a former client? And if he felt the need to do so, why not disclose he had been discharged -- or relieved -- by Grove Fresh? Given Mr. Messina's inclination for disclosing information I find it revealing -- and not accidental -- that he chose this particular occasion to be silent.

Having watched an evasive Mr. Messina under cross-examination waffle over his reasons for omitting the obvious, I cannot choose but to disbelieve them. Not just because of his long experience as a lawyer, and his demonstrated sensitivity to how false impressions may be fostered by relevant omission,[26] but also because he admitted that for the purposes of the existing Grove Fresh litigation -- and his appeal -- he understood he was no longer a Grove Fresh lawyer, yet chose not to amend or withdraw as attorney of record after Grove Fresh voiced its objections. Mr. Messina's (implied) attorney status, therefore, is not well-grounded in fact for Rule 11 purposes.

Second, Mr. Messina violated Rule 11 because he certified the matter was filed with a proper purpose when it was not. Mr. Messina's purpose in mischaracterizing his status was improper; to piggyback his personal appeal onto the Grove Fresh suit to obtain a semblance of personal standing. Mr. Messina's long experience as a lawyer, if not the reasonable inquiry required by Rule 11, should have alerted him not only to the impropriety of appealing a personal matter without personal standing, but of filing an appeal before the issues had been

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[26] For example, in the very appellate brief in question, Mr. Messina argues that the defendants, in a Seventh Circuit brief of their own, wrongfully accused him of professional misconduct through "false statements and innuendoes created by the omission of relevant and material facts." Mr. Messina makes much of what the defendants "failed to disclose" and "falsely imply," and he goes into some detail over their alleged use of "misleading half-truth[s] to create [a certain] impression." Mr. Messina's evident awareness of the potential of language to mislead makes his own silences all the more suspicious, and his attempts to hold others to a standard which he himself did not follow all the more reprehensible.

properly placed before the district court. I find his protestations to the contrary disingenuous as the means by which he chose to approach the Court of Appeals.

Third, Mr. Messina violated Rule 11 because the filing of his brief was not warranted by existing law. It was, in fact, precluded by it. A person who brings an appeal must have standing to do so. Moy v. Cowen, 958 F.2d 168, 170 (7th Cir. 1992). It is a well-settled rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Marina v. Ortiz, 484 U.S. 301, 304 (1988). In most cases, this means parties of record at the time the judgment was entered, including those who have become parties by intervention, substitution or third-party practice. In re VMS Ltd. Partnership Sec. Litig., 976 F.2d 362, 366 (7th Cir. 1992). But see In re Proceedings before Federal Grand Jury, 643 F.2d 641, 643 (9th Cir. 1981). Moreover, Local Rule 43 maintains

> [n]o pleading, motion, or other document shall be filed in any case by any person who is not a party thereto, except by leave of Court first had and obtained. . . .

Mr. Messina was not a party to the action, did not then represent a party to the action, and had no adverse judgment to appeal.[37] A reasonable inquiry into the law would have shown Mr. Messina that he had no standing to appeal. There was no reasonable basis for his believing otherwise. After listening to Mr. Messina, and sifting through the record, I believe he filed not inadvertently or by mistake, but with the intent to deceive the Seventh Circuit into believing he had standing when he knew in fact he did not.

Since Mr. Messina's brief was not well grounded in fact, was certified for an improper purpose, and was unwarranted by existing law, I find he violated Rule 11. I therefore fine Mr. Messina $1000,

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[37] Mr. Messina's "appeal" was really a request for an evidentiary hearing and a declaration that a consulting agreement he signed was void.

and require him to compensate the Grove Fresh defendants for any expenses incurred in addressing the Seventh Circuit filing.[39]

Summary

To sum up, I find Mr. Messina in contempt of this court for his actions in four separate instances. For his acts of civil contempt, Mr. Messina is ordered to compensate the parties for losses resulting from his noncompliance, including attorney's fees and costs incurred in preparing and prosecuting Mr. Messina for contempt (this may include overhead and support personnel). The defendants shall submit to me for review the total of these compensatory fines within two weeks from the date of this opinion.

For each of his four acts of criminal contempt, Mr. Messina is ordered to pay $1000 to "the United States of America."

Since there is a significant risk of repetition of Mr. Messina's disobedience of court orders, I require Mr. Messina to post a $50,000 bond for the next five years, with the admonition that any future disclosures -- made without first consulting me and proving an independent public source -- will lead to forfeiture of this amount, if not further sanctions.

Finally, for his violations of Rule 11, I fine Mr. Messina $1000, and require him to compensate the other side for the costs they have incurred.

Conclusion

In tragedy, the dénouement "should arise out of the plot itself. . . ." Poetics at 242. And so it does here: the sanctions imposed

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[39] Although I am sanctioning Mr. Messina under Rule 11, Rule 11 "is not the exclusive source for control of improper presentations of claims, defenses, or connections." Fed. R. Civ. P. 11 advisory committee's notes, 1993 amendment. My analysis would also support sanctions under the court's inherent powers or under 28 U.S.C. § 1927, and I summon both as alternate authority for the sanctions.

by this court on Mr. Messina arise naturally from his own errors of judgment. Like the ultimate fate of the great figures of literature, the spectacle of an experienced attorney brought so low by his own actions serves as a cautionary tale to others, and inspires the cathartic emotions of fear and pity recognized by Aristotle as the hallmarks of tragedy.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: 9 June 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | No. 90 C 5009 |
| Plaintiff, | ) | Judge Zagel |
| v. | ) | Filed Under Seal Pursuant to Court Order |
| JOHN LABATT LIMITED, a Canadian corporation; et al., | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED JULY 11, 1995

Motion (260-1) for a new trial or to amend the judgment is granted in part and denied in part. Those portions of the Memorandum Opinion and Order of 9 June 1995 which impose criminal sanctions of $4,000.00 are vacated. The request for a new trial is denied. Matters relating to criminal contempt are referred to the United States Attorney's Office for investigation and possible prosecution.

[Additional statement on reverse of Minute Order:]

In my Memorandum Opinion and Order of 9 June 1995, I found John Messina guilty of four separate acts constituting both civil and criminal contempt. I ordered him to pay $1000 to "the United States of America" for each of his four acts of criminal contempt. Mr. Messina now moves this court for a new trial, or, alternatively, to amend the judgment by vacating the criminal penalties entered against him.

In International Union, United Mine Workers of America v. Bagwell, 114 S.Ct. 2552 (1994), the Supreme Court examined "the somewhat elusive distribution between civil and criminal contempt fines" and

instructed us that courts "still may impose noncompensatory, petty fines for contempt" without conducting a jury trial. Id. at 2563. Mr. Messina's actions, and the sanctions he received, do not fall into the categories of cases which the Court suggests require heightened criminal procedural protections: (1) "serious criminal contempts involving imprisonment of more than six months; (2) "serious" fines (i.e., $52 million); and (3) indirect contempts involving widespread, ongoing out-of-court disobedience to complex injunctions. Id. at 2556-63.

The only valid point raised by Mr. Messina concerns the issue of notice. Mr. Messina correctly maintains that sanctions for criminal contempt can never be imposed if the contemnor was not given notice that he was specifically charged with criminal contempt. Fed.R.Crim.P. 42(b) ("The notice shall . . . state the essential facts constituting the criminal contempt and describe it as such.") (emphasis added); Pabst Brewing Co. v. Brewery Workers Local Union No. 77, AFL-CIO, 555 F.2d 146, 151 (7th Cir. 1977).

My remarks prior to the hearing -- ("It is my view that whatever sanctions there [are] are likely to be civil") -- may have lead Mr. Messina and the other attorneys involved to reasonably believe that criminal contempt was not at issue in the hearing. If this is the case, then Mr. Messina did not get the specific notice to which Fed.R.Crim.P. 42(b) entitles him, and the criminal contempt sanctions imposed against Mr. Messina cannot be allowed to stand.

I therefore vacate those portions of my opinion of 9 June 1995 which impose criminal penalties. Left unaffected by this amendment of the judgment are the civil penalties earned by Mr. Messina -- which are independent of, and severable from, any criminal sanctions -- as well as all findings of fact.

Mr. Messina is not totally off the hook, however. I still believe that criminal contempt sanctions against Mr. Messina are an appropriate way to vindicate his flouting of this court's authority. I therefore refer the matter to the United States Attorney's Office for investigation and possible prosecution.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | No. 90 C 5009 |
| Plaintiff, | ) | Judge Zagel |
| v. | ) | Filed Under Seal Pursuant to Court Order |
| JOHN LABATT LIMITED, a Canadian corporation; et al., | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED AUGUST 27, 1996

Motion for leave to file consumer class action complaint is denied. Motion in the alternative to disclose proposed complaint to and refer clients to Lawrence Walner is granted.

Mr. Messina moves for leave to file a consumer class action complaint in the Circuit Court of Cook County, Illinois. I am satisfied that Mr. Messina in his proposed complaint does not reveal information which has been deemed confidential. I am also satisfied that the public sources cited by Mr. Messina provide an independent basis for naming Mr. Marshall, Mr. Benton, and Flavor Fresh as defendants.

But I am not satisfied, based on past experience, that Mr. Messina should serve as class counsel. See, e.g., Grove Fresh Distributors, Inc. v. John Labatt Ltd., 888 F. Supp. 1427, 1447-48 (N.D. Ill. 1995) ("Mr. Messina's willingness to hurt his perceived enemies . . . pales beside his willingness to run roughshod over the best interests of his client. . . . Had he been class counsel, I would have afforded him no fees, because he was seemingly incapable of placing his client's interests above his own."). Therefore I deny Mr. Messina's motion for leave to file the complaint.

However, so that his clients and the class of orange-juice consumers he would otherwise represent are not prejudiced by this denial, I grant Mr. Messina's alternative motion to disclose the proposed complaint, and refer clients, to Mr. Lawrence Walner. I have no reason to believe that Mr. Walner, who is serving as counsel for orange-juice consumers in three related class-actions pending in Cook County, will subordinate his clients' interests to his own.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | No. 90 C 5009 |
| Plaintiff, | ) | Judge Zagel |
| v. | ) | Filed Under Seal Pursuant to Court Order |
| JOHN LABATT LIMITED, a Canadian corporation; et al., | ) | |
| Defendants. | ) | |

MINUTE ORDER DATED FEBRUARY 6, 1997

Enter judgment order awarding attorneys fees and costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| Plaintiffs, | ) | No. 90 C 5009 |
| v. | ) | Honorable James B. Zagel |
| JOHN LABATT LIMITED, a Canadian corporation, et al., | ) | |
| Defendants. | ) | |

JUDGMENT

On June 9, 1995, this Court issued its Memorandum Opinion and Order Containing Findings of Fact and Conclusions of Law which found that the respondent, John P. Messina, had violated this Court's orders, and also that the respondent had violated Rule 11 of the Federal Rules of Civil Procedure. As part of that order, the respondent was directed to compensate the petitioners for losses resulting from his misconduct, including attorney's fees and costs that were incurred as a result thereof.

This matter now comes before the Court on the separate petitions of John Labatt Limited and American Citrus Products Corporation for payment of attorney's fees and costs. This Court has considered the petitions and supporting material submitted by John Labatt Limited and American Citrus Products Corporation, the various objections and arguments filed on behalf of the Respondent, and the testimony received and the arguments heard in open court on January 21, 1997.

In conformance with the Court's ruling in open court on January 21, 1997, it is hereby ordered:

1. The respondent, John P. Messina, is found to have disobeyed this Court's orders and to have violated Rule 11 of the Federal Rules of Civil Procedure as stated in this Court's Memorandum Opinion and Order Containing Findings of Fact and Conclusions of Law dated June 9, 1995.

2. The respondent, John P. Messina, shall pay the petitioner, John Labatt Limited, $67,478.63 in respect of attorney's fees expended and $1,590.45 in costs incurred, for a total payment of $69,069.08.

3. The respondent, John P. Messina, shall pay the petitioner American Citrus Products Corporation, $77,929.88 in respect of attorney's fees expended and $2,555.49 in costs incurred, for a total payment of $80,485.37.

4. Interest shall accrue on the amounts to be paid from the date of entry of Judgment at the rate of 5.61 % per annum pursuant to 28 U.S.C. § 1961.

February 6, 1997
Date

Enter:

/s/ James B. Zagel

James B. Zagel,
United States District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 7, 1998

BEFORE

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., etc., | ) | Appeal from the United States District Court for for Northern District of |
| Plaintiff-Appellee, | ) | Illinois, Eastern Division |
| v. Nos. 95-2603, 97-1471, 97-2867 | ) | No. 90 C 5009 |
| | ) | James B. Zagel, Judge |
| JOHN LABATT, etc., et al., | ) | |
| Defendants-Appellees. | ) | |

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the defendant-appellee, all of the judges on the original panel voted to deny and none of the judges in active service has requested a vote thereon.[1]

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

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[1] The Honorable Ilana Diamond Rovner took no part in the consideration of the suggestion for rehearing en banc.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 14, 1998

| | | |
|---|---|---|
| GROVE FRESH DISTRIBUTORS, INC., an Illinois corporation, | ) | |
| *Plaintiff-Appellee,* | ) | Appeal from the United States District Court |
| Nos. 95-2603; 97-1471; 97-2867 | ) | for the Northern District |
| v. | ) | of Illinois, Eastern |
| JOHN LABATT LIMITED, a Canadian corporation; JOHN LABATT, INC., a California corporation; LABATT FOOD COMPANY, a division of John Labatt Limited; EVERFRESH, a division of Labatt Food Company; EVERFRESH, INC., a Michigan corporation, and EVERFRESH, INC., a Canadian corporation, jointly d/b/a EVERFRESH JUICE CO.; AMERICAN CITRUS PRODUCTS CORPORATION, an Illinois corporation d/b/a HOME JUICE CO.; DANIEL KOTOWICKI; ALBERT "ACE" ALLEN; CHARLES JAMAIL; and HENRY LANG, | ) | Division. |
| | ) | No. 90 C 5009 |
| | ) | James B. Zagel, *Judge* |
| *Defendant-Appellees.* | ) | |

Appeal of JOHN P. MESSINA

Upon consideration of MOTION TO STAY THE MANDATE, filed on May 13, 1998, by counsel for the appellant,

IT IS ORDERED that the motion is GRANTED. The mandate in these appeals is hereby STAYED pending the filing of a petition to the Supreme Court for a Writ of Certiorari. See Fed. R. App. P. 41(b). The bond currently in place shall remain so pending the outcome of proceedings in the Supreme Court. Counsel for appellant is reminded of its obligation under Circuit Rule 41(e).

**U.S. Constitution, Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Constitution, Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Federal Rules of Civil Procedure**

**Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions**

**(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstance,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

**(c) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

**(1) How Initiated.**

**(A) By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

**(B) On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

**(2) Nature of Sanction; Limitations.** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted

for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

**(3) Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

**(d) Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.